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FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

ROBERT E. LEE
NICHOLAS JOHNSON
H. REX LEE
CHARLOTTE T. REID
RICHARD E. WILEY
BENJAMIN L. HOOKS

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Disposition of
APRIL 1, 1973, BROADCAST RENEWAL APPLICATIONS FOR ALABAMA AND GEORGIA

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON ON GEORGIA-ALABAMA RENEWALS

CONCURRING OPINION OF COMMISSIONER BENJAMIN L. HOOKS ON ALABAMA-GEORGIA BROADCAST RENEWALS

On March 29, 1973, the Commission noted actions to be taken by the staff under delegated authority in connection with disposition of April 1, 1973 broadcast renewal applications for Georgia and Alabama.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

The FCC decided in August 1972 (see Pennsylvania and Delaware Renewals, —— F.C.C. 2d ——) to take affirmative—if modest—steps to enforce its rules designed to discourage discriminatory employment practices. The Commission decided to take action against stations employing more than ten people and showing any of the following employment patterns:

1. No female employees, or a decline in the number of female employees from 1971 to 1972.
2. No black employees, or a decline in the number of black employees from 1971 to 1972, in areas with a minority population of 5% or more.

If this statistical minimum to which the Commission proposed to adhere was mild, the method of enforcement was equally gentle: when a station did not comply with these standards, the Broadcast Bureau would send it a letter simply asking a station to explain its employment practices. Certainly nobody would argue that this was a cruel or unusual punishment.

Today the majority takes action which undermines and substantially discounts even its own disgracefully weak rules. Faced with a large number of stations in Alabama and Georgia not in compliance with the above described standards, the majority asked the staff to *reduce* the number of stations that would receive letters if we were to be so bold as to comply with our own decisions. Today the Broadcast Bureau presents to the Commission an abridged list of stations to be sent letters of inquiry. As to which stations remain on the list and which have been *a priori* "pardoned" by the staff, a roll of the dice would have as rationally decided the difference. For example, WHOS, which, from 1971 to 1972, added a black and subtracted a

109-044—73——1

woman employee, will get a letter; WDHN, which cut back on women *and* got rid of its only black employee, will not receive a letter. This kind of arbitrary staff procedure reflects an arbitrary Commission order that they reduce the list. Nobody told staff *how* to separate the good from the bad among the ugly, and *post facto* it is impossible to see any method in the madness.

Why could not all stations not in compliance with such minimal standards have been sent our mild letter of inquiry which asks so nicely that they merely explain their employment practices? Why does the majority now decide that its carefully and conservatively conducted statistical analyses leading to the above-described standards should be ignored in favor of the grab-bag policy it now implements? Is truth really such a monster as to be avoided at all costs? I think not. I dissent.

Today not only is the majority abdicating its responsibility to protect the public interest in equal opportunity employment, it is also proposing to renew the licenses of Georgia and Alabama stations which refuse to serve the public's needs for a minimal amount of news, public affairs and other non-entertainment programming.

I do not ask much of our nation's broadcast licensees. Yet it is my job as a Commissioner to ensure that those who we have licensed to use the airwaves in the "public interest" live up to some responsibilities. In 1968, after an exhausting and intensive study former Commissioner Cox and I concluded that the public interest could not be arbitrarily found to have been served by those who broadcast less than 5% news, 1% public affairs and 5% other non-entertainment programming. We would have established these guidelines for translating the intentions of Congress into a language of positive action. But the majority prefers to adopt policies in the meaningless obscurity of unmeasured space. At this time the Commission approves the renewal of licensees who do not intend to, and have not in the past, lived up to even the minimal standards by which I take my stand in the public interest.

For example, the majority today finds no violation of the public interest when WEBJ proposed to have *no* public affairs programming whatsoever. But as long as the majority insists on adopting no operational standard of the public interest, insists on nonpolicy floating in space, such a programming proposal will be accepted the same as any other. Such an unstructured and undisciplined approach is not rational policy. It is not any policy.

Here are the stations proposing less than 5% news:

Call letters and locations	*Percent news now proposed*
WRIP, Rossville, Ga	1.0
WGKA, Atlanta, Ga	1.5
WAVO, Decatur, Ga	3.6
WTHB, Augusta, Ga	4.0
WJAZ, Albany, Ga	4.6
WBAM, Montgomery, Ala	4.7
WTCG–TV, Atlanta, Ga	2.3
WJCL(TV), Savannah, Ga	4.5
WDHN–TV, Dothan, Ala	4.6

The following stations propose between 0.5% and 0.99%. Public Affairs Programming:

WABB	WFOM	WLET
WACL	WGAF	WMLT
WBLJ	WHBB	WMNZ
WCOX	WHHY	WMSL
WERH	WJAT	WTCB
WFDR	WJJC	WTIF
WFMH	WLAY	WTRP

WEBJ proposed 0%; WSNT proposed less than 0.5%.

The program proposals of these stations in the combined category of Public Affairs and "other programs" (exclusive of sports and entertainment) were:

1.0-1.9 percent	3.0-3.9 percent		4.0-4.9 percent	
WVLD	WDIG	WHHY	WALG	WMSL
	WDNG	WJRD	WAUG	WNPT
	WFOM	WLAY	WAZA	WOMN
	WGKA	WRFC	WCLS	WQXI
	WGOV	WDHN-TV	WCUG	WSGA
	WGST		WJOI	WTBC

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

It is with great trepidation that I concur in the action taken by the Commission in this matter. This action may be supportable by the majority when viewed from the standpoint of efficiency and reduction of the Commission's backlog, however, my principal reason for concurring is the imminent establishment of the Commission's external equal employment opportunity office. Although, in light of what I feel to be very questionable equal employment opportunity reports submitted by most Alabama and Georgia renewal applicants, there are still very serious questions which have not been answered to my satisfaction. Those reports reflect a continuation of the footdragging practices of the communications industry. It is difficult, if not impossible, for me to understand how the broadcasters here involved can allege that they have and will continue to operate in the public interest when the only people they hire, promote, train and otherwise utilize are, for the most part, of a single ethnic persuasion. Which fact, especially when viewed alongside the minority and female population breakdown of their service areas, shows a pattern of *benign neglect* to a substantial portion of the population they serve.

This neglect is wasteful of the human resources within their communities and negates assertions by the broadcasters that they operate in the public interest. The unresolved question is, therefore: how can broadcasters operate in the public interest when they have chosen to black-out of their narrow world, a very substantial portion of the population? The bulk of the Alabama and Georgia renewal applicants have endeavored to make a very visable segment of the population invisable. Operation in the public interest means much more than efficient utilization of the spectrum and furnishing an aural and/or visual service to the public; it also means effective utilization of human

resources as well. This wasteful non-use of human resources makes my concurrence even more reluctant because I firmly believe that the record shows less than an adequate movement in that direction on the part of the stations herein involved.

My concurrence in this matter, though fraught with misgivings and as stated previously, was tendered because of the imminent establishment by the Commission of an External Equal Employment Opportunity Office which will be charged with assuring the Commission and the public that broadcasters are doing everything within their power not only to present programming attuned to the needs of their service area, but also to utilize to—the fullest extent possible—the human resources within their communities. That EEO Office will be in a position to review, on more regular basis than is now done, the employment practices of the broadcast industry and will recommend, whenever certain patterns are extant, remedial action against those stations including calling for early renewal of licenses. The establishment of that Office should put licensees on notice that the old, "I can't find one" footdragging technique of yesteryears is as extinct as the Brontosaurus of the Jurassic Period.

Programming, while not specifically at issue here because it has always been (and rightly so) principally within the purview of the licensees is nonetheless an integral part of this proceeding. It is a mystery to me that licensees can aver that they have operated in the public interest when few or none of the programs presented addressed themselves to the issues which are important to the people who reside within their service areas. Performance versus promise is a strong indicator of whether a licensee is qualified to continue in its role as trustee of the public airways. Thus, more responsiveness by broadcasters is expected by the Commission.

Furthermore, I have been advised that untimely and/or informal petitions to deny or defer were filed against a great number of Georgia renewal applicants. I trust those petitions caused the stations involved to take a closer look at their activities to the same degree as they caused me in reaching my decision to reluctantly concur in this matter.

F.C.C. 73-616

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH CO. (A.T. & T.) Revisions of Tariff F.C.C. No. 260 Private Line Service Transmittal No. 11610	Docket No. 19691

MEMORANDUM OPINION AND ORDER

(Adopted June 11, 1973; Released June 13, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; REID AND WILEY DISSENTING; COMMISSIONER JOHNSON CONCURRING IN THE RESULT

1. We have before us two petitions by the American Telephone and Telegraph Company (AT&T) in this proceeding. In its first petition, AT&T requests that we modify the procedures herein to specify that the initial decision be prepared by the Administrative Law Judge and that the Common Carrier Bureau staff be barred from advising the Commission. The Association of American Railroads (AAR) has filed a petition to the same effect; the American Petroleum Institute (API), and the Utilities Telecommunications Council (UTC) filed Statements in support; and Microwave Communications Inc. (MCI), filed an opposition to which AT&T replied. The second AT&T petition requests that this Docket 19691 be deferred pending completion of the Joint Board proceeding Docket 19528, or alternatively, that the two dockets be consolidated. AAR, API, MCI and UTC have opposed this petition and AT&T has replied. For the reasons stated below we deny AT&T's petitions.

2. For essentially the same reasons as stated in our Memorandum Opinion and Order Released May 4, 1973, in Docket 19419, (FCC 2d —, —) we decline to modify the procedures in this case. As in Docket 19419, this proceeding is an existing docketed matter.[1] Our stated policy of separating the trial staff in most rate cases is intended to be implemented for future cases, but we cannot, in the absence of compelling reasons, retroactively apply it to cases in existence without imposing too severe a strain on our resources.

3. In its petition to defer or consolidate this proceeding with Docket 19528, AT&T argues that Docket 19528 involves essentially the same issues as this Docket 19691. with substantially the same evidence to be presented. Thus AT&T claims that to separately litigate both pro-

[1] Two prehearing conferences have been held and information requests were served on May 30, 1973.

ceedings would be wasteful and inefficient. AT&T also claims that to proceed with this case would, in some unexplained way, undermine our pledge of cooperation with the state regulatory agencies and usurp the function of the Joint Board in Docket 19528.

4. We will deny this petition of AT&T because we find its arguments misconstrue the nature of the two cases and the issues therein. The first difference between the cases is that this case involves only interstate private line facilities, where Docket 19528 involves message toll and WATS service which utilize the public switched network. As to message toll service, it must be recognized that the service is used primarily by subscribers to local exchange telephone service. While it may be true that there are also some facilities, such as local distribution cable and main frames, which are used in common with private line service, the history of the regulation changes in AT&T's Tariff F.C.C. No. 260 shows clearly that even AT&T considers that private line services does not require the same type of protection from possible harm which might be caused by customer provided equipment as does the public switched network. Thus, until the present regulations became effective, no protective equipment was required. Further, the regulations which have now become effective are significantly different from those contained in message toll and WATS tariffs in that the requirement for "protection" will only result, according to AT&T, in the use of additional equipment in a very small percentage of cases where customer equipment is utilized.

5. A second major difference between the proceedings is that this case involves a question of lawfulness of a filed, effective, tariff regulation, applicable to, and effecting only interstate service. Docket 19528, on the other hand, raises no questions of lawfulness of any existing tariff regulation, but is an inquiry and rulemaking proceeding which seeks to determine what additional options, if any should be given to customers.[2] Further, a decision in this case will affect only AT&T's Tariff F.C.C. No. 260, and interstate private line services and could not create conflicts with any state tariff. The message toll service at issue in Docket 19528 involves a service offering in which the same facilities are used for interstate and intrastate service. The need for coordination with the state commissions is obvious in that case. Where we have total jurisdiction over the facilities ourselves, as in this case, there is no question as to our duty to resolve the issues presented therein. Such resolution implies no less a commitment to proceed in a spirit of cooperation in Docket 19528 and we are frankly surprised that AT&T would so suggest. We therefore believe deferral or consolidation would be inappropriate.

6. Therefore, IT IS ORDERED, That the petitions of AT&T and AAR ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] Docket 19528, itself, does not contemplate prescription of tariff changes, but does recognize that "it may be necessary to institute such ancillary procedures and issue such orders as may be required under section 205 . . ." 35 F.C.C. 2d 539, 543 (1972).

F.C.C. 73R-213

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of B.B.C., INC., RENO, NEV.	Docket No. 19694 File No. BPH-7735
KIDD COMMUNICATIONS, INC., RENO, NEV. For Construction Permits	Docket No. 19695 File No. BPH-7855

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1973; Released June 8, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING AND VOTING TO ADD A MISREPRESENTATION ISSUE. BOARD MEMBER NELSON ABSENT.

1. The above-captioned mutually exclusive applications for authority to construct an FM broadcast station in Reno, Nevada, were designated for hearing by Commission Order, FCC 73-209, 38 FR 5936, published March 5, 1973. The Review Board has before it a motion to enlarge issues, filed by B.B.C., Inc. (BBC) on March 20, 1973, requesting addition of site availability, maintenance of public file (Section 1.526), Section 1.65 and misrepresentation issues with respect to the application of Kidd Communications, Inc. (Kidd).[1]

2. *Site Availability.* BBC charges that although Kidd indicated in its application that it will utilize the transmitter site and tower of standard broadcast Station KBET, it never obtained permission to use that site. In support, BBC submits a statement from the owner-manager of KBET in which he states that, although he informally discussed the use of the site with Chris Kidd, the applicant's largest stockholder, he never authorized Kidd to "use it in his application." The Broadcast Bureau supports the addition of an issue, citing *Salem Broadcasting Co., Inc.*, 40 FCC 2d 458, 26 RR 2d 1565 (1973). Kidd, in opposition concedes the unavailability of the site, but alleges that it was Chris Kidd's understanding from conversations with the owner-manager of Station KBET that the site would be available. Kidd represents that, having been advised that the site is not available, it is now in the process of locating a new site and will file an appropriate amendment when such a site is obtained. Since no amendment has been filed and acted upon by the Presiding Judge, the Review Board is constrained to add a site availability issue.

[1] Also before the Board are the following related pleadings: comments, filed April 4, 1973 by the Broadcast Bureau; and an opposition and an affidavit in support thereof, filed by Kidd on April 9, and April 11, 1973, respectively.

3. *Maintenance of Public File.* BBC argues that Kidd violated the requirements of Section 1.526 of the Commission's Rules by failing to have a file available for public inspection at the designated offices of its local attorney. BBC attaches a statement signed by Kidd's local attorney and dated November 28, 1972, which relates that the file was returned to Kidd at its request some sixty days prior to the date of the statement. In light of the custodian's statement, and in the absence of information to the contrary, the Broadcast Bureau supports the addition of an issue. Kidd opposes the instant request and attaches a statement from its local attorney who states that Chris Kidd removed the application for purposes of amendment and duplication; that in late November, 1972, he (the attorney) gave a letter (attached to BBC's motion) to a lady; and that within a matter of days the application was returned to his office. Kidd asserts that no requests for inspection of the application were made, other than the inquiry "apparently made on behalf of BBC", and that since it had no intention of removing the file from public accessibility and stood ready to make available its application, no issue is warranted.

4. The Board is of the view that a Section 1.526 issue is warranted in light of Kidd's acknowledgement that the file was not available at the specified location. The absence of requests for inspection of the application and readiness to provide the application should such a request have been made, do not vitiate the prescription of Section 1.526 of the Rules. However, we have no reason to doubt Kidd's assertion that there was no intent to conceal information from the public, the application was returned to the specified location shortly after the request to see it was made, no prejudice has been alleged or shown, and the violation appears to be an isolated instance. The issue being specified will therefore be limited to the comparative qualifications of Kidd. *WIOO, Inc.*, 37 FCC 2d 342, 25 RR 2d 312 (1972) and cases cited therein.

5. *Section 1.65.* BBC requests the addition of a Section 1.65 (candor) issue with respect to the circumstances surrounding the unavailability of the transmitter and tower site and the failure to maintain a public file at the specified location, and, in addition, requests a Section 1.65 issue based on the following two allegations: (1) that on February 22, 1973, Kidd petitioned for leave to amend its application to reflect the withdrawal of Mrs. Betty Hamlin, a 12.2% stockholder of Kidd,[2] the withdrawal having occurred moret han 30 days prior to the filing of the petition; and (2) that Chris Kidd failed to inform the Commission of a judgment rendered against him in a local county court. The Broadcast Bureau, opposes the addition of an issue on the grounds that: (1) the February 22 amendment constitutes substantial compliance with the requirements of Section 1.65, and, in any event, does not concern matters of sufficient decisional significance; and (2) the allegation concerning the judgment against Chris Kidd is unsupported by an affidavit as required by Section 1.229(c) of the Rules; nor is there attached to the request a certified copy of the judgment.

[2] No opposition was filed and the amendment was accepted by Order of the Presiding Judge, FCC 73M-388, released March 27, 1973.

6. Kidd, in opposition, urges that the February 22 amendment is in substantial compliance with Section 1.65 and that an issue is therefore unwarranted. Kidd submits three reasons for not reporting the local judgment for "alleged" damage to an apartment: the judgment totalled approximately $300 plus attorney's fees and was, therefore, *de minimis;* $250 has already been garnished from Kidd's wages; and the judgment is presently under appeal.

7. The Review Board will not add the requested Section 1.65 issues. First, there are no facts alleged which indicate a lack of candor with respect to the unavailability of the transmitter site and tower or with respect to Kidd's failure to maintain a public file at the specified location for a period of some two months. The Board agrees with the Bureau and Kidd that the amendment reflecting the withdrawal of a stockholder of Kidd was in substantial compliance with Section 1.65 of the Rules. The failure to report the local judgment against Kidd, while not a practice to be condoned, does not in our opinion constitute a serious and flagrant omission warranting an issue, especially in light of the facts that the amount of the judgment was *de minimis* and has been substantially satisfied by garnishment proceedings, and that there is no allegation that the law suit or underlying conduct could have any significance in this proceeding.

8. *Misrepresentation.* BBC argues that the circumstances surrounding the unavailability of the transmitter site and tower and the failure to maintain a public file at the designated location warrant evidentiary inquiry as to whether Kidd misrepresented relevant facts to the Commission. The Broadcast Bureau supports the addition of an issue with respect to representations concerning the transmitter and tower site in the absence of a satisfactory explanation, citing *WIOO, Inc.*, 39 FCC 2d 856, 26 RR 2d 1059 (1973). The Board will not add the requested issues because there is nothing in the pleadings which would compel us to disbelieve Kidd's assertion that, at worse, the situation is one of misunderstanding rather than misrepresentation. Kidd states that discussions with the owner-manager of Station KBET gave rise to an "honest and sincere" belief that the site would be available; the statement of the owner of the property indicates that such discussion did take place; and the owner does not state that he told Kidd at that time that the property was unavailable. Under these circumstances, we believe that while Kidd's understanding was mistaken, BBC has failed to establish any concerted effort by Kidd to mislead the Commission. Compare *Lake Erie Broadcasting Co.*, 31 FCC 2d 45, 22 RR 2d 647 (1971). Finally, the request for a misrepresentation issue with respect to the failure to maintain a public file at a specified location is also unsupported and equally without merit.

9. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed March 20, 1973, by B.B.C., Inc. IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

10. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine whether the transmitter and antenna site specified by Kidd Communications, Inc. is available to it;

(b) To determine whether Kidd Communications, Inc. has maintained its public file at the location specified by it as required by Section 1.526 of the Commission's Rules, and, if not, the effect on its comparative qualifications to be a Commission licensee.

11. IT IS FURTHER ORDERED, That the burden of going forward and of proof under issue (a) specified above SHALL BE upon Kidd Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-544

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of A.H. BELO CORP., ASSIGNEE and BEAUMONT TELEVISION CORP., ASSIGNOR A.H. BELO CORP., TRANSFEROR and JAMES M. MORONEY, JR., JOSEPH M. DEALEY AND MYRON F. SHAPIRO, VOTING TRUSTEES For assignment of license of Stations WFAA-AM-FM-TV and for transfer of control of Beaumont Television Corp.	BAPL-430; BALH-156; BALCT-505 and BTC-7073

MAY 23, 1973.

MR. JAMES M. MORONEY, JR.,
A.H. Belo Corp.,
Communications Center,
Dallas, Tex. 75222

MR. MYRON F. SHAPIRO,
Beaumont Television Corp.,
Communications Center,
Dallas, Tex. 75222

GENTLEMEN: This refers to the *pro forma* applications for assignment of license of WFAA-AM-FM-TV, Dallas, Texas from A.H. Belo Corporation to Beaumont Television Corporation (BAPL-430; BALH-156; BALCT-505) and for transfer of control of Beaumont Television Corporation, licensee of KFDM-TV, Beaumont, Texas from A.H. Belo Corporation to James M. Moroney, Jr., Joseph M. Dealey and Myron F. Shapiro, Voting Trustees (BTC-7073) which were granted today. This also refers to informal complaints filed by WADECO, Inc. and Civic Telecasting Corporation against the subject applications and your responses thereto.

As you are aware, the license renewal applications of the subject stations have been in deferred status; WADECO, Inc. has filed an application mutually exclusive with the renewal application for WFAA-TV; and Civic Telecasting has filed a Petition to Deny the license renewal applications for all the subject stations.

We have considered the complaints and your responses solely in the context of these *pro forma* applications and have determined that a grant of them would serve the public interest. In making this determination we have also considered the question raised by WADECO, Inc. in its informal complaint regarding possible improvement of WFAA-TV's comparative position in the area of

integration of ownership and management in the comparative renewal proceeding. As we have informed counsel for WADECO, Inc., a renewal applicant such as WFAA–TV is judged in this area solely on the basis of its past performance, and not on its integration of ownership and management. A copy of our letter to counsel for WADECO, Inc. is enclosed. Further, the grant of these applications has been made without prejudice to whatever action we may deem appropriate with regard to the pending license renewal applications.

Commissioner Johnson concurring in part and dissenting in part and issuing a statement. Commissioner H. Rex Lee concurring and issuing a statement. Commissioner Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Opinion of Commissioner Nicholas Johnson, concurring in part and dissenting in part

While I concur with that portion of the majority's opinion which designates a comparative hearing on the mutually exclusive application of A.H. Belo Corporation and WADECO, Inc., to operate on channel 8, Dallas, Texas, I cannot agree with the majority that the accompanying assignments and transfers of control serve the public interest.

Rather, I tend to agree with WADECO that these intricate assignments appear designed as a means to improve the comparative position of the current WFAA–TV licensee. I can perceive no other cogent purpose for these assignments, and despite the majority's language suggestion that the position of WFAA's licensee will not be so improved, I must admit that I have my doubts. For, sadly, such assurances are often mere words—words whose intent is easily lost through the months of hearings which follow FCC designation orders.

In short, while I am not at all persuaded that these assignment transactions serve the "public interest, convenience or necessity," I am also fearful that their real intent will return to haunt not only WADECO and not only those parties who have filed petitions to deny against WFAA's license renewal applications, but also this Commission.

Concurring Statement of Commissioner H. Rex Lee

A. H. Belo Corporation, licensee of Stations WFAA–AM–FM–TV in Dallas, Texas,[1] has filed applications on FCC Form 316 (Short Form or *Pro Forma*) for: (1) assignment of the station licenses to its wholly-owned subsidiary, Beaumont Television Corporation (licensee of Station KFDM–TV, Beaumont, Texas); [2] and (2) transfer

[1] Belo also publishes the *Dallas Morning News* (daily and Sunday newspapers) and a number of suburban newspapers in the Dallas area.

[2] In 1969, the Commission approved transfer of control of Beaumont Television from stockholders of Beaumont Broadcasting Corporation to Belo. See 17 FCC 2d 577, 16 RR 2d 93.

of control of Beaumont Television from Belo to three voting trustees, James M. Moroney, Jr., Joseph M. Dealey and Myron F. Shapiro. At present, 68.65% of Belo's stock is owned by the G. B. Dealey Trust, a testamentary trust, and is voted by Moroney, Dealey and Joseph A. Lubben as trustees. Belo now proposes to assign its broadcast licenses to Beaumont Television and to place all of the subsidiary's stock in a voting trust, which will have Moroney, Dealey and Shapiro as trustees and which will last until December 31, 1982. Belo maintains that control of the licensee will not change with these transactions since Moroney and Dealey effectively exercise control over the broadcast stations through the G. B. Dealy Trust interest in Belo and since they will continue to exercise such control under the proposed arrangement. In regard to the purpose of the applications, Moroney and Dealey represent that the proposed assignment of licenses and transfer of control of Beaumont Television are intended to preserve control over the broadcast stations beyond termination of the G. B. Dealey Trust, which expires in 1975; that the applications are not intended to, and will not have the effect of changing the existing control of the stations and of Belo during the life of the G. B. Dealey Trust; and that each trustee intends to continue in such capacity under both trusts until terminated.

Civic Telecasting Corporation, whose principals were previously involved in the operation of UHF television Station KMEC–TV in Dallas, has objected to grant of the applications. It argues that the proposed arrangement will result in a substantial change in the control of the stations and that there is no reasonable or legitimate purpose for the overall plan. Civic Telecasting contends that the applications represent an attempt by Belo to avoid the possible revocation of its broadcast licenses as a result of a civil antitrust action brought against Belo and other parties, charging the defendants with monopolizing the television industry in the Dallas-Fort Worth area and discriminating against KMEC–TV through their newspaper interests.[3] Civic Telecasting has petitioned to deny the license renewal applications of Belo on essentially the same grounds raised in the antitrust action.[4]

As the Commission points out in its letter rejecting Civic Telecasting's objections, there appears to be a legitimate purpose for the filing of the applications, and the complainant has not demonstrated how the proposed arrangement will enable Belo to avoid the consequences of its stewardship of the broadcast stations or related business activities. Moreover, Belo has expressly disclaimed any intent to evade

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[3] See *UHF, Inc.* v. *The Times Herald Printing Company, T.H. Liquidating Company and the A. H. Belo Corporation,* Civil Action No. 3–4156–A, filed September 9, 1970, in the United States District Court for the Northern District of Texas, Dallas Division.

[4] Action on the petition to deny is being deferred until the Commission has received sufficient information relating to the allegations made in the civil antitrust suit and the petition to deny to permit the discharge of its statutory responsibilities. The Commission has simutaneously designated the WFAA–TV renewal application for hearing along with the competing application of WADECO, Inc. and has conditioned any grant of the WFAA–TV renewal application on whatever action may be appropriate as a result of the Court's decision in the Texas antitrust action.

responsibility for the operation of its stations and newspaper interests. On the basis of such representations and the fact that the Commission would have to approve any actual transfer of control of the licensee, I have concurred in the grant of the applications. However, I intend to remain alert for any indication that Belo's purpose in filing the applications was to avoid possible impact on its broadcast licenses that might result from an adverse resolution of the civil antitrust action in Texas.

F.C.C. 73-546

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Objections by CIVIC TELECASTING CORP., DALLAS, TEX. To transfer of control of Stations WFAA-AM-FM-TV and KFDM-TV	BAPL-430; BALH-156; BALCT-505; and BTC-7073

MAY 23, 1973.

AIR MAIL
MR. JAMES T. MAXWELL,
President, Civic Telecasting Corp.,
4440 Sigma Road, Suite 112,
Dallas, Tex. 75240

DEAR MR. MAXWELL: This refers to your letter of March 5, 1973 concerning the *pro forma* applications for assignment of license of WFAA-AM-FM-TV, Dallas, Texas from A. H. Belo Corporation to Beaumont Television Corporation (BAPL-430; BALH-156; BALCT-505) and for transfer of control of Beaumont Television Corporation, licensee of KFDM-TV, Beaumont, Texas from A. H. Belo Corporation to James M. Moroney, Jr., Joseph M. Dealey and Myron F. Shapiro, Voting Trustees (BTC-7073). Beaumont, the licensee of KFDM-TV, is a wholly owned subsidiary of Belo, the licensee of WFAA-AM-FM-TV, and Belo is controlled by James M. Moroney, Jr., Joseph M. Dealey and Joseph A. Lubben as trustees of the G. B. Dealey Trust, which owns about 68% of the stock of Belo. Thus the effect of the applications is to place all the stations under one licensee, Beaumont, and for Moroney, Dealey and Shapiro to control the licensee directly.

You contend that Form 316 applications cannot be used to request Commission consent to the proposed transactions because they would actually result in a substantial change in control of the licensees so that Form 314 or 315 applications would be required. You state that although Dealey and Moroney together can exercise control over the stations both under the present arrangement and under the proposed arrangement, Lubben plus Dealey or Moroney can also exercise control presently and Shapiro plus Dealey or Moroney could exercise control under the proposal. For purposes of Form 316, as long as more than 50% of the voting power remains in the hands of old stockholders (or other persons empowered to vote the stock, as in this case), control has not changed, even though several possible control groups could be formed from various combinations of old and new stockholders.

You also state that "There is no reasonable or legitimate purpose for the overall plan" and that "one of the real purposes, among others, is an attempt by Belo to avoid the possible revocation of its broadcasting licenses. You do not state how the reorganization proposed would

avoid any possible revocation, but we note that Civic Telecasting Corporation has filed petitions to deny the renewal applications for WFAA–AM–FM–TV and KFDM–TV, which have been deferred since August 1, 1971.

An amendment to the *pro forma* assignment and transfer applications signed by Joseph Dealey and James M. Moroney, Jr. states with reference to the purpose of the applications, "These applications are intended to provide for maintenance of the control over the broadcast stations beyond termination of the G. B. Dealey Trust that now exists and has previously existed by reason of that trust . . . Neither of the above applications is intended to nor will it have the effect of substantially changing common voting control of the broadcast stations and of the A. H. Belo Corporation during the life of the G. B. Dealey Trust . . . It is the intention of each of the undersigned, in the event of Commission approval of the above applications, to continue to act as Trustees under the Voting Trust until it is terminated, and to continue to serve as Trustees under the G. B. Dealey Trust until it is terminated."

It is thus clear that there was a legitimate purpose for filing these applications and the applicants expressly disclaim any attempt to avoid the consequences of their stewardship of the subject stations or related business activities. In view of the above, we have this day granted the subject applications. However, the grant was made expressly without prejudice to whatever action we may deem appropriate with regard to the pending license renewal applications. Enclosed, for your information, is a copy of our letter to the applicants advising them of this fact.

Commissioner Johnson concurring in part and dissenting in part and issuing a statement. Commissioner H. Rex Lee concurring and issuing a statement. Commissioner Hooks absent. (See FCC 73–544 for Statements.)

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-545

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Objections by WADECO, INC. To grants of *pro forma* applications for assignment of license of WFAA-AM-FM-TV, Dallas, Tex., and for transfer of control of Beaumont Television Corp.	BAPL-430; BALH-156; BALCT-505 and BTC-7073

MAY 23, 1973.

MR. THOMAS M. P. CHRISTENSEN,
Welch & Morgan
300 Farragut Building,
900 Seventh Street NW.,
Washington, D.C. 20006

DEAR MR. CHRISTENSEN: This refers to your letter of March 5, 1973, which is an informal objection to the grants of the *pro forma* applications for assignment of license of WFAA-AM-FM-TV, Dallas, Texas from A. H. Belo Corporation to Beaumont Television Corporation (BAPL-430; BALH-156; BALCT-505) and for the transfer of control of Beaumont Television Corporation, licensee of KFDM-TV, Beaumont, Texas from A. H. Belo Corporation to James M. Moroney, Jr., Joseph M. Dealey, and Myron F. Shapiro, Voting Trustees (BTC-7073).

You state that you represent WADECO, Inc., which filed an application for WFAA-TV's facilities on July 1, 1971, which is mutually exclusive with the renewal application for WFAA-TV. You note that Myron F. Shapiro, one of the proposed voting trustees, is presently vice president and general manager of WFAA-TV and owns .00443545% of the voting stock of Belo. You state that the purpose of the applications is for the WFAA-TV renewal applicant to improve its comparative position in the area of integration of ownership and management in anticipation of the forthcoming hearing on the theory that Mr. Shapiro will be effectively a one third owner of the licensee. The short answer is that a renewal applicant such as WFAA-TV is judged in this area solely on its past performance, and not on its integration of ownership and management.

In view of the above, we have this day granted the subject applications. Enclosed for your information is a copy of our letter to the applicants advising them of our action.

109-044—73——2

Commissioner Johnson concurring in part and dissenting in part and issuing a statement. Commissioner H. Rex Lee concurring and issuing a statement. Commissioner Hooks absent. (See FCC 73–544 for Statements.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-583

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of
PRIVATE FUNDING FOR CERTAIN ACTIVITIES OF CABLE TELEVISION TECHNICAL ADVISORY COMMITTEE (CTAC)

JUNE 1, 1973.

The Commission by Commissioners Burch (Chairman), Robert E. Lee, Reid, Wiley and Hooks with Commissioner H. Rex Lee concurring and Commissioner Johnson dissenting, issued the following PUBLIC NOTICE:

PRIVATE FUNDING FOR CERTAIN ACTIVITIES OF CABLE TELEVISION TECHNICAL ADVISORY COMMITTEE (CTAC)

In accordance with the provisions of Section 12(b) of the Federal Advisory Committee Act (P.L. 92-463, October 6, 1972) the Commission has authorized the Cable Television Technical Advisory Committee (CTAC) to solicit private funds in the amount of $150,000 per year for the purpose of administering specified activities of the Committee.

The Advisory Committee is composed of a Steering Committee and nine panels, with a total membership of approximately 150 persons who have particular expertise in various technical phases of cable television. Members of the Committee represent diverse elements of industry, government, and the public, with each individual working group balanced in membership so as to assure that the deliberations and recommendations to the Commission will not be inappropriately influenced by any special interests.

Since the areas of study by the various working panels are interrelated, the substantial output of technical papers will require cross-distribution among many, if not all, of the CTAC panels. Special laboratory testing and the conduct of credible subjective viewing tests will require additional expenditures. The Commission recognizes the need to support testing and evaluation procedures and for a paid industry administrator with full-time clerical assistance to expedite the work of the Advisory Committee and its panels and to avoid the loss of momentum resulting from limitations of manpower and facilities in the Cable Television Bureau. Lacking sufficient funds for the designated purposes, the Commission has determined that in the interests of efficiency and expediency of the CTAC working panels, solicitation and utilization of private funds is warranted and proper.

The CTAC Steering Committee proposes solicitation of a $150,000 per year budget from various non-government sources. Procedures for solicitation and administration of funds have been formulated to the extent set forth herein below. Changes or refinements in either solicitation or administrative procedures will be a matter of public record, available for inspection in the offices of the Commission's Cable Television Bureau, located at 2025 M Street, N.W., Washington, D.C. Solicitation of funds will be accomplished as follows:

1. Solicitation will be carried on by mail, utilizing a letter describing the work of CTAC, and the need of and projected use of donated funds.
2. The Committee will use its own stationery for the solicitation letter.
3. FCC authorization for non-government funding, in the form of this Public Notice, will be attached to each letter of solicitation.
4. No corporation or individual will be permitted to contribute in excess of 15% of the total amount solicited.
5. The names of contributors and amounts donated will be a matter of public record in the appropriate files of the Cable Television Bureau.
6. Stringent procedures will be enforced in the access and administration of all funds, with appropriate accounting to be a matter of public record.
7. Periodic audits of committee funds will be performed as prescribed by the Commission's Advisory Committee Management Officer.
8. Contributors will exercise no control or influence over CTAC functions or the editorial content of its reports and recommendations, by virtue of their contributions.
9. Upon termination of the functions of the Executive Secretary, any funds remaining will be returned to the contributors on a pro rata basis.

Funds will be used for the following purposes:

1. Salaries for Executive Secretary and staff.
2. Rental of office space, furniture and fixtures.
3. Supplies, reproduction of documents, and postage.
4. Administrative expenses.
5. Staff expenses to attend all meetings of CTAC committee and working panels, and recordation of minutes of such meetings.
6. Rental of conference space when meetings are scheduled in locations other than Washington, D.C.
7. Special laboratory testing and evaluation.

Interested persons are permitted to attend, appear before, or file statements with the Advisory Committee. Copies of committee minutes, reports, studies and other documents which were made available to or prepared for or by the Advisory Committee shall be available for public inspection and copying in the offices of the Cable Television Bureau.

F.C.C. 73R-219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COSMOS BROADCASTING CORP. (WSFA-TV), MONTGOMERY, ALA. For Construction Permit	Docket No. 16984 File No. BPCT-3643

APPEARANCES

William P. Sims and *Richard F. Swift*, on behalf of Cosmos Broadcasting Corporation; *John P. Bankson, Jr.*, on behalf of WTVY, Inc.; *Jack P. Blume* and *James K. Edmundson*, on behalf of Eagle Broadcasting Company (WYEA-TV) and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUPPLEMENTAL DECISION

(Adopted June 11, 1973; Released June 15, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Cosmos Broadcasting Corporation (Cosmos), licensee of VHF television broadcast station WSFA-TV, operating on Channel 12, Montgomery, Alabama, to change transmitter site and increase antenna height. The proceeding was designated for hearing by Commission Order, released November 21, 1966. A brief history of the proceeding is found in the Review Board's previous Decision in this case (21 FCC 2d 729, 18 RR 2d 538 (1970)), wherein the Board denied the application under a *Suburban* issue. On April 14, 1971, the Commission, by Order, 28 FCC 2d 630 (1971), remanded the proceeding to the Review Board pursuant to paragraph 79 of its *Report and Order, Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971), which permitted applicants in then pending hearings to amend their applications with respect to any outstanding *Suburban* issue. Cosmos did file such an amendment on May 24, 1971. Thereafter, the Review Board, by Memorandum Opinion and Order, 31 FCC 2d 200, 22 RR 2d 723 (1971), found that "Cosmos has properly conceived and administered surveys of both community leaders and the general public in its 'gain area'", but that "the applicant's programming proposal is too vague and generalized".[1] The Board therefore remanded

[1] The Board also noted several "defects" which, while standing alone would not necessitate further hearing, could also be explored at hearing; *viz.*, that Cosmos' community leader survey seemed to limit an interviewee to listing three or four problems, that the general public survey was represented to be marketing research for some university professors and thus may have affected the responses received, and that the programming proposals might not be responsive to the specific needs of the black population of the proposed gain area.

the proceeding to the Administrative Law Judge to resolve the question of whether the programming reflected Cosmos' ascertainment efforts.

2. In a Supplemental Initial Decision, FCC 72D–23, released April 7, 1972, the late Administrative Law Judge Millard F. French concluded that Cosmos has met the *Suburban* issue and recommended that the application be granted. Specifically, he found that Cosmos proposed particular programs, identified by title, time segment, duration, frequency and description, together with the specific community problem, including needs of the black population in the gain area, which will be treated in the programs. He also found that responses of community leaders were not limited, that valid survey methodology was utilized in the general public survey and that both surveys resulted in the ascertainment of major community needs of the proposed gain area.

3. The proceeding is now before the Review Board on exceptions filed jointly by Eagle Broadcasting Company (WYEA–TV) (Eagle) and WTVY, Inc. (WTVY). Cosmos and the Broadcast Bureau support the Supplemental Initial Decision. We have reviewed the Supplemental Initial Decision in light of the exceptions and brief, Cosmos' reply, the arguments of the parties,[2] and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and complete, and his conclusions persuasive and adequately supported by the findings. Furthermore, the Presiding Judge has, in our opinion, adequately dealt with the arguments raised in the joint exceptions, and no useful purpose would be served by further discussion here. Therefore, except as modified in the rulings on exceptions contained in the attached Appendix, and upon finding that the public interest would be served thereby, Judge French's Supplemental Initial Decision is adopted.

4. ACCORDINGLY, IT IS ORDERED, That the application of Cosmos Broadcasting Company (BPCT–3643) to change transmitter site and increase antenna height IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, *Member, Review Board.*

APPENDIX

RULINGS ON THE JOINT EXCEPTIONS OF EAGLE AND WTVY

Exception No.	*Ruling*
1	Granted. This is a more precise restatement of the questions noted by the Review Board in our Order remanding this proceeding to the Administrative Law Judge.
2	Denied. The additional findings proposed are beyond the scope of the instant inquiry (see our ruling on Exceptions No. 1 and 20) and are thus irrelevant to a proper resolution of the issue. Moreover, the requested findings are not warranted on the merits since there is no indication that the applicant omitted major communities from the survey, agricultural leaders were surveyed, and the needs of the rural population were adequately ascertained.

[2] Oral argument was held before a panel of the Review Board on May 24, 1973.

Exception No.	*Ruling*
3,4,5,17	Denied in substance. The Judge's findings comport with the weight of the record evidence. The contention that the questions utilized by the interviewers inhibited the responses of the community leaders interviewed is speculative and without record support. The applicant's testimony is to the contrary, a fair reading of the questionnaire in its entirety does not support the contention, and the problems elicited by the questions are not so few as to warrant the findings contained in these exceptions.
6,7,8,9,18,19	Granted to the extent that the Judge determined that Hewett's opinion is entitled to "great" weight and that his techniques resulted in a positive benefit to the general public survey, and *denied*, in all other respects. The Presiding Judge was, in our view, essentially correct in concluding that the phraseology of the questionnaire had "no material effect on the survey or the results obtained therefrom" and, therefore, that Cosmos' survey of the general public is adequate and in compliance with the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Moreover, the context of the statement in Q & A 19 of the *Primer* on which Eagle and WTVY rely (see also paragraph 51 of the accompanying *Report and Order*) merely reflects the Commission view that adequate responses can be better achieved if an interviewee realizes that he is specifically being asked about community problems rather than assuming he is participating in a casual conversation or is being asked his program preferences. Seen in this light, Cosmos' survey did not violate the language of the *Primer*, because the interviewees were told the purpose of the interview; *viz.*, that it was to ascertain the problems and needs of the community. Moreover, as pointed out by counsel at oral argument, the Commission has recently held that an applicant for change in facilities need not conduct a survey of the general public within the proposed gain area. See Lakewood Broadcasting Service, Inc. (KLAK–FM), FCC 73–154, released February 13, 1973.
10,15	Denied. We are of the view that any modification of Cosmos' programming proposal was insubstantial; that no prejudice to Eagle and WTVY or the public resulted from such modification and that, therefore, the modification would neither render Cosmos' programming proposal vague nor in any other manner be a bar to grant of the application. Furthermore, the Board has held in the past that it would consider changes which were not the subject of amendments where there would have been grounds for granting a petition for leave to amend, had one been filed. *Ultravision Broadcasting Co.*, 11 FCC 2d 394, 12 RR 2d 137 (1968); *Genkar, Inc.*, 35 FCC 774, 1 RR 2d 766 (1963). Here, in sharp contrast to the circumstances of the cases cited by Eagle and WTVY, an amendment would properly have been accepted, and therefore we do not regard the failure to amend as fatal.

Exception No.	*Ruling*
11, 12	Denied. The record indicates that Cosmos has ascertained the major problems which exist in the proposed gain area and that Cosmos has identified specific programs with which it proposes to help deal with those needs. There is no requirement or mention in the *Primer* or *Report and Order* that a licensee must create new programming to deal with the ascertained needs of a gain area. Rather, they require a licensee to provide programming responsive to the area problems the licensee chooses to treat. Cosmos has shown that its existing format can be utilized to meet this *Primer* requirement and the Board has found no evidence in the record which would tend to disprove the showing; nor have Eagle and WTVY alleged that such evidence exists. In our previous Decision, we held that an applicant cannot merely state that the needs ascertained in its gain area would be incorporated into its present program format, but has to (if it chooses to utilize its present format) specifically identify which programs will deal with what problems. We did not state and did not mean to imply that an applicant for changed facilities cannot utilize existing programs to meet the needs of the gain area. We are also of the view that Villar's statement that "it would be impossible to deal with a small individual community problem" unless that problem "were considered to be of significance and interesting to the entire coverage area" (Tr. 1990) does not contradict Cosmos' previous showing that it would deal with major problems within its gain area regardless of interest or significance to other parts of its coverage area. The Board believes that Villar's testimony and the question to which it is a response merely indicate that Cosmos does not propose to provide a local service, dealing with local problems, for each of the communities in its proposed gain area. Such intent is consistent with statements of the Commission which indicate that where the major needs of the gain area are generally similar throughout that area, broadcast licensees are not required to provide local programming responsive to the specific local problems of each community in that area. *Selma Television, Inc.*, (*WSLA–TV*), 29 FCC 2d 522, 526, 21 RR 2d 1151, 1157–58 (1971). Such intent is also consistent with *Stone* v. *FCC*, 466 F. 2d 316, 328, 24 RR 2d 2105, 2119 (U.S. App. D.C., 1972), where the Court stated that a television broadcast facility need not provide a local service for each of the communities in its coverage area, but that major problems of a specific locale must be treated regardless of interest or relevance to other areas of service. We note, too, that, as Eagle and WTVY admitted at argument, the applicant will have a secondary, rather than primary, obligation to serve the gain area and is therefore required only to ascertain the major needs of that area.
13	Denied, for the reasons stated in our Decision and these Rulings on Exceptions.

Exception No.	*Ruling*
14	Denied. The applicant has submitted an adequate explanation with regard to the areas it does not intend to serve and, to the extent this exception relates to those areas, it is irrelevant. As this exception relates to ascertainment efforts within the service area, see our Ruling on Exception No. 20.
16	Denied, for reasons stated in our Ruling on Exceptions No. 10, 11, 12 and 15.
20	Denied. The Presiding Judge was correct in limiting the subject inquiry, his findings and conclusions to the factors specifically mentioned by the Review Board in its remand Order. Where the Board has already considered the issue and drawn certain conclusions, an inquiry upon remand may properly be limited to those questions expressly left unresolved by the Board. We believe such procedure is both proper and, here, appropriate. In the instant case, the Board in its Order stated that it found Cosmos' ascertainment efforts to be adequate in certain respects, and also stated precisely what questions remained to be resolved. Exception No. 1, supra, by WTVY and Eagle indicates they understood what questions we did leave to be resolved. With regard to those questions which were within the scope of the instant inquiry, the Judge was also correct in regarding Cosmos' amended showing to be of decisive significance. Both the courts and the Commission have held that when amendments are permitted in order to upgrade ascertainment efforts, a tribunal need not explore nor evaluate pre-existing questions of fact regarding those efforts unless it is shown that, after amendment, those deficiencies still exist. *Stone* v. *FCC*, supra; *Selma Television* (*WSLA–TV*), supra; Radio Eden, 21 FCC 2d 464, 18 RR 354 (1970).

F.C.C. 72D–23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COSMOS BROADCASTING CORP. (WSFA–TV) MONTGOMERY, ALA. For Construction Permit	Docket No. 16984 File No. BPCT–3643

APPEARANCES

Richard F. Swift, James A. Treanor, III and *James V. Dunbar*, on behalf of Cosmos Broadcasting Corporation; *John P. Bankson, Jr.*, on behalf of WTVY, Inc.; *Jack P. Blume*, on behalf of Eagle Broadcasting Company (WYEA–TV) (formerly Gala Broadcasting Company); and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER MILLARD F. FRENCH

(Issued April 4, 1972; Released April 7, 1972)

PRELIMINARY STATEMENT

1. Cosmos Broadcasting Corporation (hereinafter Cosmos or WSFA–TV), licensee of television station WSFA–TV, Channel 12, Montgomery, Alabama, seeks authority to change its transmitter site and increase its antenna height. Cosmos' application for a construction permit was denied by the Review Board in a Decision, adopted February 18, 1970, on the grounds that Cosmos had failed to meet its burden of proof under a *Suburban* issue originally designated by the Commission November 21, 1966. Appplications for review of the Board's Decision were filed by Cosmos and by respondents, WTVY, Inc. (hereinafter WTVY), licensee of television station WTVY–TV, Dothan, Alabama; Martin Theatres, Inc. (hereinafter Martin Theatres), licensee of television station WTVM, Columbus, Georgia; and Eagle Broadcasting Company (hereinafter Eagle or WYEA–TV), licensee of television station WYEA–TV, Columbus, Georgia. Subsequently, by order released April 14, 1971, the Commission remanded Cosmos' application to the Review Board for action consistent with Paragraph 79 of the Commission's *Report and Order, Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV–A and IV–B of FCC Forms*, and for preparation of a Supplemental Initial Decision only in connection with the amended *Suburban* showing to be submitted by Cosmos.

By order dated January 19, 1972, the Commission denied the petition filed by WTVY, Martin Theatres and Eagle for reconsideration of its order remanding this proceeding.

2. On May 24, 1971 Cosmos filed with the Review Board an amendment of application and petition for immediate grant in accordance with the Commission's *Report and Order, supra.* By order released August 18, 1971, although the Board found that "Cosmos has properly conceived and administered surveys of both community leaders and the general public in its 'gain area,'" the Board believed the programming proposed by Cosmos to meet community problems in the gain area was "too vague and lacking in the specificity required by the *Primer* . . ." Accordingly, the Board accepted the Cosmos amendment, reopened the record and remanded the proceeding to the Hearing Examiner for adduction of evidence and issuance of a Supplemental Initial Decision under the *Suburban* issue. In addition, the Board stated that the parties could explore in hearing certain additional questions, namely: (a) whether the question contained in the community leader survey form asking the person interviewed to name the three or four most pressing problems facing his community would tend to limit his response; (b) whether an introductory statement in the general public survey questionnaire to the effect that interviewers were performing "marketing research for some professors at the University of Alabama" might have affected the nature of the answers given; (c) whether Cosmos' programming proposals were responsive to the specific needs of the Negro population in the gain area; and (d) whether Cosmos' program proposal is sufficiently specific "to insure that the results of community surveys will play a substantive role in shaping what is actually to be presented on the air."

3. A prehearing conference was held on September 13, 1971, and hearing sessions were held on November 3 and 4, 1971. The record in this proceeding was closed on November 30, 1971. In addition to Cosmos, WTVY, Inc. and Eagle Broadcasting Company participated in the hearing as did the Chief, Broadcast Bureau. Proposed supplemental findings of fact and conclusions of law were filed by Cosmos and jointly by WTVY, Inc. and Eagle Broadcasting Company on January 31, 1972, and reply findings and conclusions were filed jointly by WTVY and WYEA–TV, Cosmos and the Broadcast Bureau on February 17, 1972.

FINDINGS OF FACT

4. Operating as proposed, WSFA–TV would provide predicted Grade B service to 294,400 additional persons in 7,350 square miles in Alabama, Georgia, and northern Florida. Under the *Primer*, WSFA–TV was obligated to ascertain the needs and interests of those persons residing within a 75-mile radius of its proposed transmitter site at Grady who would gain service from the proposed operation. This 75-mile radius includes all or portions of some 40 counties in Alabama, Georgia and Florida. WSFA–TV elected not to serve six Georgia counties within this 75-mile contour on the grounds that persons residing therein obtained either Grade A or Grade B service

from the three full-time network affiliated stations in Columbus. It also eliminated the areas in northern Florida within the 75-mile radius because most of these areas are served by stations in Florida or other Alabama communities. Within the State of Alabama, the survey did not extend to Shelby, Talladega, Clay, Bibb, Perry, Wilcox and Conecuh Counties, since WSFA–TV felt that only small portions of each were within the 75-mile gain area, with little or no population. Thus, WSFA–TV's efforts to ascertain community problems were confined to that portion of the gain area within the 75-mile radius which it viewed as containing significant populations and which it believed to be "allied geographically, economically, politically and socially to its Alabama service."

Community Leader Survey

5. In determining the problems of the gain area, Cosmos interviewed about 160 community leaders in 22 cities in 15 counties. This survey was conducted by a WSFA–TV management team consisting of the general manager, station department heads and a black newsman. Prior to the actual survey, a team meeting was held on April 8, 1971, at which time team members received instructions on taking the survey. A memorandum signed by Bob G. Villar, general manager, and Dixon C. Lovvorn, senior administrator and gain area survey director, was distributed to interview team members, which contained sections on locating community leaders, conducting the interview, making progress reports and incurring travel expenses. The instructions in the memorandum concerning the conduct of the interview stated that team members would be furnished with a form for guiding the interview, that the form was not to be considered rigid, that additional probing questions should be asked in order to expand comments or to explain positions, that additional contacts should be elicited and that interviews should be conducted in person. The memorandum also called attention to the fact that groups with the greatest problems may be the least organized and have the fewest recognized spokesmen and that additional efforts on the part of each interviewer may be necessary to establish a dialogue with such groups and ascertain their problems.

6. Each interviewer was provided with copies of the community leader questionnaire which was not meant to be filled in by the person interviewed but was to be used for the collection of information by the interviewer. This survey form contained the following introduction and questions:

> As a part of its obligation to operate in the public interest, WSFA–TV maintains a continuing effort to keep abreast of the principal problems and interests of its service area. WSFA–TV is preparing an application to be filed with the FCC—and in this connection, we are again attempting to ascertain the needs and interests of the area we serve. We ask that you, as a recognized leader in the community, assist us in this effort by providing your views on the principal problems facing your community and the principal interests of its residents.
>
> The following questions are designed to elicit this information. While suggestions for specific programs are welcome, we are primarily concerned with the problems and interests of the community without reference to programming. We believe such information will be of greater benefit in stimulating our own ideas for new programs, as well as ideas for the content of existing programs.

I. In your opinion, what are the three or four most pressing problems facing the community today?
II. What are your suggestions as to what can be done to solve these problems?
III. What are the principal interests of the citizens of the community?
IV. How can the Montgomery broadcast media help to meet any aspect of the problems, needs and interests mentioned above?
V. If programs or program material are developed from the above comments, would you or your organization be willing to participate in them?
VI. Please give any other comments you may have.
Interviewed by:_____
Date:_____

_____
Name
_____
Position, Organization
_____
Address
_____
Phone Number

7. Mr. Villar, general manager of WSFA–TV, testified that no attempt was made to limit the response of the community leader in any fashion. In personally conducting his interviews, Mr. Villar stated that those interviewed responded freely in describing community problems. He did not limit any response to three or four problems but, to the contrary, generally asked them during the course of the interview whether there were any other problems of concern to the community or to them. He stated that the last question in the survey form also was designed to elicit this additional information.

8. Subsequent to the survey, the other members of the interview team told Mr. Villar that none of their interviews were restricted to eliciting just three or four community problems. They described their interviews to him as being expansive and conversational so that each person interviewed had sufficient opportunity to discuss community problems openly.

9. Mr. Villar stated that the first question in the questionnaire was designed as a ground-breaking introductory question to the overall interview and was not used to limit anyone's response.

10. Dr. Wendell C. Hewett, Doctor of Business Administration at the University of Alabama, who supervised the survey of the general public for the applicant, also testified that the form of the first question in the community leader survey served as a "breaking-the-ice" type of question as far as the interviewer was concerned. It was his opinion there would not be any difference between the question as structured in the community leader survey and one that asked for the most pressing problems facing the community. He stated that an introductory question should be structured so that it encourages the respondent to answer the question, and that if it were left completely open it could overwhelm him. This type of question gives the respondent a chance to think of three or four answers. He also noted that as more than one community leader was interviewed, more problems would be identified.

11. The community leaders surveyed by Cosmos responded with an aggregate number of community or county problems in excess of 230, however, many of the problems were repeated in the interviews because some of them are common to practically all communities.

12. WTVY–TV and WYEA–TV did not present any testimony on this proposition, but in their proposed findings, by way of argument, contended that the first question limited the persons being interviewed to three or four problems. In support of that argument, the respondents point out that (1) leaders in nine communities responded with only three or four problems; (2) in fifteen communities only one leader discussed over four problems; and (3) overall, 125 of the leaders interviewed limited their response to three or four problems.

General Public Survey

13. In order to ascertain community problems in the proposed gain area, in addition to the 160 community leader interviews, Cosmos retained Wendell C. Hewett, Doctor of Business Administration at the University of Alabama, who performed an independent survey of 400 members of the general public. Dr. Hewett was assisted in this project by his colleagues at the University, Dr. Morris Mayer, Chairman of the Department of Marketing at the University; Dr. Ed Smith, a full professor at the University; and Dr. Barry Mason, a full professor at the University who is also in charge of research for the School of Commerce and Business administration.

14. Dr. Hewett received his Bachelor and Master Degrees in Business Administration from Texas Tech University in 1960 and 1961, respectively, and in 1969 received his Ph.D. in Business Administration from the University with a major in Marketing and a minor in Business Statistics. He is currently Associate Professor of Marketing at the University of Alabama where he has been teaching since June 1970. Prior to that, from 1968 to 1970, he was Associate Professor of Marketing at Northeast Louisiana University and from 1963 to 1968 was an instructor in Marketing as Texas Tech.

15. Since his arrival at the University of Alabama, he has taught Marketing Research, a senior level marketing course, and is primarily responsible for a graduate course, Quantitative Marketing, which deals with different quantitative techniques utilized to make marketing decisions. In his Marketing Research course, Dr. Hewett supervises questionnaire construction and design, sample sizes, statistical reliability, report writing and summarization. In his college teaching experience, he also taught undergraduate courses in Principles of Marketing, Business Statistics, Advertising, Marketing Problems, Marketing Research, Sales Management, and Salesmanship. Dr. Hewett teaches approximately 100 students each semester. Each fall and spring term he supervises student research projects in which students define a research project, construct questionnaires, interview people face-to-face, gather the data and then analyze the information collected. One of his classes conducted a study for the University's Continuing Education Division to determine the problems of the small businessman in Tuscaloosa County.

16. In addition to his teaching experience, Dr. Hewett also has conducted research projects for clients outside the academic community. For example, in Monroe, Louisiana, he directed a market research study for an advertising agency to determine the demographic characteristics of shoppers who shopped at certain shopping centers. He

also worked with his colleague, Dr. Smith, in developing a Product User Profile Study for WSFA–TV. Another project on which he worked involved identifying the impact of outdoor advertising in Tuscaloosa. He was also employed as a market research consultant by the Bureau of Research and Community Service, University of Alabama in Birmingham, and has been a statistical consultant for a study the Veterans Administration is doing in Birmingham. Dr. Hewett is a member of the American Marketing Association and a member of the Southern Marketing Association.

17. The introductory paragraph of the general public survey questionnaire contained the following statement: "Good morning/afternoon/evening, I'm (name of interviewer). I am doing some marketing research for some professors at the University of Alabama."

18. This introductory statement was developed by Dr. Hewett and his colleagues. He stated that they did not identify WSFA–TV as the sponsor of the project for the following reasons:

a. If WSFA–TV had been identified bias would have been introduced into the study through answers from respondents who felt strongly about WSFA–TV (either for or against). Identification of WSFA–TV as the sponsor of the project was proposed and the idea was rejected to obtain more objective answers from respondents.

b. In market research projects, it is normal procedure to conceal the identity of the sponsor to eliminate respondents bias. The following quote from Boyd and Westfall illustrates this point:

> When respondents get an idea that a survey is being made for a particular company or product, they have a tendency to respond favorably toward the sponsor. In a mail survey among FM radio owners in the area covered by a small FM radio station, respondents were asked to list the four FM stations to which they listened most. The sponsoring station came out on top by far. A study of the individual questionnaires, however, showed that many of the respondents had associated the survey with that station apparently through the address to which the questionnaire was mailed.[1]

19. In his testimony Dr. Hewett further noted that because some people are reluctant to give answers if they do not know how the questions will be utilized, he preferred to identify the survey as research being conducted for professors at the University of Alabama. He testified that he had no intention of misleading the public in using this language but merely wished to elicit some response and also gain as much objectivity as possible.

20. The results of Dr. Hewett's survey efforts show that some 26 problems were identified through the survey and were broken down demographically. The survey also included detailed information about (a) what factors respondents liked most and least about living and working in the proposed gain area, (b) suggestions for improving living and working conditions in the area, (c) whether a community was a better or worse place to live, (d) leisure time hobbies and activities, and (e) suggestions on how the broadcast media could improve the community.

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[1] Boyd, Harper W. and Westfall, Ralph. *Marketing Research Text and Cases*, Revised Edition (Homewood, Illinois: Richard D. Irwin, Inc., 1964), pp. 315–316.

21. The record further reveals that the students doing the interviewing were not told who was sponsoring the survey, and consequently could not have known about WSFA–TV's interest.

22. Again the two respondents did not present any evidence concerning the general public survey. Instead, they relied in their proposed findings upon argument to the effect that although the questionnaire used for such survey opened with the question, "What are the most important problems facing this Community today?," the interviewer was instructed to "List no more than 4" problems. Thus the general public survey suffers from the same deficiency as the community leader survey. Such argument cannot stand in the face of the Commission's policy that the applicant's obligation to ascertain community problems outside of his city of license requires him to be responsive to only major problems in that area, and that such ascertainment need not be as inclusive or exhaustive as that required for the city of license. The respondents further contend that the general public interviewees were misled as to the actual purpose of the survey by the failure to disclose that WSFA–TV was the sponsor. Such contention overlooks the fact that the sole purpose of the structure of the questionnaire was to gain an objective viewpoint of the problems of the communities. There is no evidence in this record to show that objectivity was not attained, and thus bias, either pro or con WSFA–TV, cannot be surmised from the general public survey.

23. The respondents further contend that Dr. Hewett, by reason of his never having conducted a survey for a broadcast station, could not be qualified as an expert on marketing research techniques. Without passing on his expertise, it is noted that by reason of his education, training, teaching and experience, Dr. Hewett was the most knowledgeable person in the field, by far, that appeared on the stand during this proceeding, and his opinion is entitled to *great* weight.

WSFA–TV Programming Proposed for Gain Area Needs

24. The problems that WSFA–TV believes are the most significant are contained in the Cosmos amendment filed with the Review Board. These problems include unemployment, education, the environment, racial understanding, youth, the economy, agriculture, municipal services, transportation, recreation, poverty and health care.

25. In response to these problems, Cosmos submits the following programming in clarification of the program showing contained in its amendment to its application. Because of the normal passage of time since the filing of the amendment, some of the programming has already been implemented or is in the planning stages.

26. The following programs, described by title, time segment, duration, frequency and description, together with the specific community problems which will be treated in the programs, are proposed:

CAPITAL NEWS CONFERENCE

Time: 9:30 p.m., Tuesday
Duration: 30 minutes
Frequency: Twice monthly

Description:

A local, live discussion program on which guests are questioned by a panel that includes the station's news director and other newsmen.

Problems:

UNEMPLOYMENT

Throughout the gain area, the problem of unemployment was of great concern to black and white alike. Nearly 30% of the blacks interviewed during the general public survey identified this as a major concern to them.

In order to cover this problem, WSFA–TV proposed to utilize the format of *Capital News Conference* to focus on the varied aspects of unemployment in the gain area and also within its current service area.

Spokesmen on the unemployment problem will be selected, among others, from the following:

Director of State Employment Service
State President, N.A.A.C.P.
Manpower Training Specialists
Officials of U.S. Government Employment Programs

These guests would be questioned, among other things, on the problems of unemployment in the gain area caused by the influx of blacks from the farms, who are poorly skilled for other employment.

TRANSPORTATION

At least one *Capital News Conference* per year will be provided dealing with the problem of transportation, traffic, streets, etc. One or more experts on the subject of transportation, traffic and/or streets will be invited to participate to answer questions relating to the problems from an urban and rural standpoint and to state what plans are afoot to solve the problems. In this manner WSFA–TV intends to inform the public and to spur the state and county governments to action.

The program will focus specifically on the problems of unpaved rural roads which was of near equal importance to blacks (10.7%) and whites (11.2%).

EDUCATION

This program will also be used to treat the problems of education which were of equal concern to blacks and whites in the gain area. For instance, prominent educators will be invited to appear on this program to discuss current problems affecting their institutions and education in Alabama in general. They will include, among others:

State Superintendent of Education
President of Alabama State University
President of Auburn University
President of University of Alabama
President of Tuskegee Institute

LACK OF ADEQUATE RECREATIONAL FACILITIES

An average of 10.5% of the persons interviewed in the gain area were concerned with the lack of recreational facilities for both adult and youth. This problem is much more acute in rural as opposed to urban areas. Related to the problem are drug use by youth, race relations and population loss in rural counties.

Capital News Conference will focus on this problem a minimum of once per year by trying to determine the cause of the problem and urging public action through awareness and response thereto.

MUNICIPAL SERVICES

This problem relates to many others mentioned by interviewees in the gain area such as unpaved streets, pollution, local government, sewers and water systems, high taxes, health care, and lack of utility services.

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At least twice during each year, representatives of various municipal governments will be invited to appear on *Capital News Conference*, discussing problems and proposed solutions in their various city governments.

Through this medium, WSFA–TV will focus on specific causes of the problems with the intent of provoking solutions through public awareness and reaction.

THE ECONOMY

Various aspects of the national and local economies will be the subject of discussion on this program. Federal and state spokesmen will also be interviewed on a continuing basis as major developments affecting the economy occur, such as the institution of wage and price controls. Guests will likely include the Governor and other elected federal and state representatives.

RACIAL UNDERSTANDING

Attitudes of the black community will be communicated through appearances on *Capital News Conference*. From the gain area survey it was noted much progress remains to be made in race relations, and WSFA–TV will continue its policy of inviting black leaders from the gain area and current service area to appear. Through this and other programs, WSFA–TV hopes to further better understanding and cooperation between the races by isolating existing problems and creating solutions through communications. Those who will be invited to appear include:

Black legislators
Black candidates for political office
Black sheriffs and local officials
Leaders of the N.A.A.C.P., S.C.L.C. and other civil rights organizations

AGRICULTURE

Agriculture continues as the most important economic factor in the gain area, and this in turn relates to several of the problems mentioned, including unemployment, substandard housing and welfare problems. Additionally, small farmers have been concerned with the high cost of mechanization and the lack of trained agricultural operators. Although these individual problems are dealt with in other WSFA–TV programming, including *Dixie Digest* and *Auburn Today*, the overall importance of agriculture to the gain area is such that these problems will also be the subject of discussion on *Capital News Conference*.

RAP SESSION

Time: 9:30 p.m., Tuesday
Duration: 30 minutes
Frequency: Monthly
Description:

This program which premiered in October 1971 is a live discussion program devoted to problems of especial interest to youth. High school and college students from the gain area and the current WSFA–TV service area will participate in free-wheeling discussions, popularly known as "rap sessions."

Problems:

Problems related directly to youth, such as drugs and delinquency, will be subjects of specific sessions. Additionally, young people will be inivited to discuss the problems of unemployment (both summer and annual), education, the environment, race, recreation and poverty. Problems of black youths, including unemployment and lack of recreational facilities will be given particular emphasis through this program. Mr. Villar testified that black youths will be invited to appear on "Rap Session" and programs may feature integrated sessions or all black or white participants.

FEEDBACK

Time: 9:30 p.m., Tuesday
Duration: 30 minutes
Frequency: Monthly
Description:

A live program on which members of the general public are given access to WSFA–TV to express views on problems of concern to them. The purpose is to permit a far-ranging dialogue of problems and issues facing Alabamians.

Problems:

Because of its unique format, the problems identified in the survey, as well as those of the current service area, can be discussed by those individuals most concerned with the problems and their solution, including community leaders and minority groups. In this way, issues such as unemployment, education, environment, racial understanding, youth, the economy, agriculture, municipal services, transportation, poverty and health care can all be aired on the program.

During the initial program in September 1971, Judge Richard Emmett spoke in favor of consolidating city and county governments; Doctor Ranier of Auburn University discussed questions and contradictions of environmental quality; Mrs. Nancy Pool asked for better education of retarded children; and Mr. Solomon Seay, a Negro, spoke in favor of court-ordered desegregation.

Spokesmen from the gain area will be informed of the opportunity this program offers and will be given time to present their viewpoints. On-the-air announcements will inform residents of the gain area of the opportunity to appear on this program.

UNTITLED DOCUMENTARY SERIES

Time: Between 6:30 and 10:00 p.m.
Duration: Two 30-minute programs
Frequency: Two-part series
Description:

Documentary on racial progress using on-the-scene film techniques to explore problems and possible solutions.

Problems:

RACIAL UNDERSTANDING

The gain area survey reconfirmed WSFA–TV's conviction that while much progress has been made in racial understanding, much remains to be done. While the great issues of equal education, employment and housing were of continuing concern, blacks also complained of slow progress in such things as streets, sanitation and recreation. The station will examine black progress in housing, employment and education in Alabama, and the many problems that remain, in a two-part documentary series. WSFA–TV will present similar reports on at least an annual basis.

PANEL DISCUSSION ON RACIAL UNDERSTANDING

Time: Between 6:30 and 10:00 p.m.
Duration: 30–60 minutes
Frequency: Minimum of one per year
Description:

Local, live panel discussion with guests of both races from the WSFA–TV service area, including the gain area. Moderated by WSFA–TV's news director.

Problems:

RACIAL UNDERSTANDING

The need for communicating black attitudes to the white community and vice versa was mentioned with some frequency during the gain area survey. Panel discussions can be an effective vehicle for accomplishing this goal and WSFA–TV will invite leaders of both races to participate in discussions of issues current at time of broadcast. During the course of their interviews, gain area com-

munity leaders indicated that they would appear if asked. Among those from the gain area who will be invited are:

William L. Radney, Mayor of Alexander City
James Malone (black), President, Henry County N.A.A.C.P.
Eugene C. Stallworth (black), School Principal, Brewton
James A. Smith (black), President, Alabama Education Association, Dothan
Joel Smith, Publisher & Editor, *The Eufaula Tribune*, Eufaula
Wynnton Melton, School Principal, Geneva
Rev. T. H. Sconiers (black), President, Geneva County N.A.A.C.P.
Don Horne, State Senator, Lee and Chambers Counties
Rev. A. L. Wilson (black), President, Lee County Voters League
Fred Gray (black), State Representative, Barbour County
Father John O'Hara, Dothan

EDUCATIONAL DOCUMENTARIES

Time: Between 6:30 and 10:00 p.m.
Duration: 30–60 minutes
Frequency: Minimum of one annually
Description:

Documentary using on-the-scene film techniques to explore educational problems and their possible solutions.

Problems:

EDUCATION

A profound idea for a documentary emerged from a community leader interview with a young black leader in Monroeville. Mrs. Delores Carmichael, an Extension Home Agent, said that she thought a major problem was that of "motivating young black people to aspire to better education." WSFA–TV will make that the central theme of a major documentary to be produced for airing in prime time. In subsequent documentaries, WSFA–TV will explore other meaningful facets of the problems of education in Alabama.

UNTITLED DOCUMENTARY ON RECREATION

Time: Between 6:30 and 10:00 p.m.
Duration: 30–60 minutes
Frequency: Special
Description:

Documentaries using on-the-scene film techniques to explore problems and possible solutions.

Problems:

RECREATION

The gain area survey revealed a strong desire for improved recreational facilities, especially among youth and the black community. The problem is grounded in the lack of revenue in municipalities complicated in several instances by racial considerations. WSFA–TV will document the problems and attitudes in Opelika and Alexander City with the belief that this would be beneficial to the many small communities with similar problems throughout its service area.

ENVIRONMENT '71

Time: 6:00 p.m.
Duration: 30 minutes per segment
Frequency: August 22, 29 and September 5, 1971, and updated annually

Description:

Three-part documentary series on Alabama environment produced by WSFA–TV and telecast in prime time.

Problems:

ENVIRONMENT

This late summer program series gave an in-depth look at serious environmental problems in Alabama, specifically channelization of the streams, mercury pollution and air and pesticide pollution. Because of the concern about this subject among community leaders and the general public interviewed by WSFA–TV

in the gain area, a follow-up series on the environment will be produced annually and scheduled in prime time. This series will be based on timely investigation of then current or continuing problems affecting the environment.

THE MINI-DOCUMENTARY

Time: 6:00 p.m. and 10:00 p.m.
Duration: 3–5 minutes
Frequency: One the average of one per week

Description:

This is an in-depth examination of a particular problem, utilizing on-the-scene news film techniques to expose its background, the views of those with opposing solutions and the options open to bring about a solution.

This mini-documentary is scheduled in news programs and generally runs as a series of at least two parts. It is an "enterprised" reporting job that digs past the hard news on the subject and uncovers the basic framework of the problem. It seeks to develop for the viewer an understanding of the problem, incorporating the possible solutions as seen by those who have to deal with the problem under study. Mr. Villar testified, for instance, that although the station can't do anything to actually pave a country road, it can expose the problem and seek to communicate solutions.

Problems:

The great advantage of this documentary approach to the programming is that virtually any problem can be exposed to the large audiences already developed for regular news programs. Because of its format, many problems can be examined in a year's time with great immediacy and timely effect.

For example, utilizing this method of programming, WSFA–TV will examine health care, hospitals, nursing homes and medical facilities of cities in the entire coverage area. The individual problem of the poor and possible solutions to their poverty will also be covered. The lack of or development of recreational facilities in the gain area and current service area will be investigated in continuing documentary coverage, in addition to a full-length documentary planned on this problem.

Programs on the continuing rural migration, substandard housing, industrialization of communities, drugs, summer employment of youths and alcoholism will be developed. Local environment concerns in small communities in the gain area can be exposed particularly well on this type of program, especially when a specific problem would not warrant a full-length documentary.

A series of documentaries will be produced on race relations and problems germane to the black population in the gain area. Black leaders, including James Whitehead of Midland City, the Rev. A. L. Wilson of Opelika, and State Representative Fred Gray of Barbour and Macon Counties, will be featured on this series.

WSFA–TV believes this format can also deal effectively with the causes, effects and solutions of unemployment problems in locations throughout the gain area and current service area. A documentary team will go into the field to examine unemployment problems in specific industrial cities like Alexander City and Opelika and in rural communities like Florala and Brewton. Interviews with the unemployed, employers and with specialists in the area of unemployment will be incorporated into the program. In this manner, WSFA–TV believes it can treat unemployment problems as they occur and continue in any locale. Rather than a broadbrush approach, this type of documentary lends itself to the examination of specific, individual and personal problems.

DAILY PUBLIC AFFAIRS SHOW

Time: Between 12:00 and 12:30 p.m.
Duration: 5 minutes
Frequency: Five times per week

Description:

This show is hosted by the WSFA–TV public affairs director and presents a kaliedoscope of public affairs happenings, events and personalities of interest to Alabama citizens. It is a locally produced, live program.

Problems:

The flexibility of this program in exploring problems of the gain area is apparent. In this manner, the station will treat, for example, the following areas:

PROBLEMS OF THE BLACKS

Specific problems of the blacks, including unemployment, racial discrimination, lack of municipal services, lack of recreation, drug abuse, substandard housing, poverty, sewers and water systems, and welfare will be covered on this program through interviews with black leaders, black youth and individuals responsible for providing services, assistance and advice in the areas enumerated above.

YOUTH

Interviews with medical, clergy and law enforcement officials dealing with drugs and youth.

Interviews with state employment officials concerning summer employment of school students.

Interviews with various city officials regarding summer recreation in the WSFA–TV coverage area.

ENVIRONMENT

Professionals and laymen concerned with the problems of the environment will appear on the average of once per month. Among those to be invited are:

President, Alabama Conservancy
Director, State Department of Conservation
Executive Secretary, Soil and Water Conservation Commission
State Forester
Presidents of responsible lay environmental societies

THE ECONOMY

At least two 5-minute interviews per month with various experts in the field of the economy will be presented.

RECREATION

At least ten shows dealing with recreation and recreation problems will be covered each year. Guests knowledgeable in the field will be invited to discuss the subject.

POVERTY

Subject matter related to the problem of poverty will be presented on the average of once per month on this program.

Subject matter will include:

Dietary expert on economy meals
Food stamp program
Directors of educational programs for the culturally disadvantaged
Authorities on low-income housing

HEALTH CARE

Several shows will be devoted to the subject of health care and services. Guests will be invited to discuss problems and progress as it concerns persons in the entire WSFA–TV coverage area.

EDUCATION

A show in which officials of education, students, teachers and members of minority groups will be interviewed concerning progress and/or problems in education. Proposed guests are:

Executive Secretary, Education Study Commission
Executive Director, Commission on Higher Education
Superintendent of Education
Director of Rehabilitation and Crippled Children Division
Director of Elementary Education

Director of Secondary Education
Various Student Leaders
County Superintendent of Education
Various Teachers
Minority Group Representatives
Director of Vocational Education

AUBURN TODAY

Time: 12:00 Noon
Duration: 30 minutes
Frequency: Weekly—Saturdays
Description:
This is a WSFA–TV produced agricultural program which covers subjects of general agricultural interest.

Problems:

ENVIRONMENT

A series of programs will be produced on environmental problems peculiar to agricultural interests. Experts on solid and animal waste disposal, pesticide pollution, and water pollution will provide guidance and instruction for rural viewers. These spokesmen will include state and federal government officials and Auburn University specialists.

AGRICULTURE

In addition, as problems arise affecting the rural population of the grain area, agricultural experts from Auburn University and other guest experts will appear on the program to discuss these areas of concern and possible solutions.

DIXIE DIGEST

Time: 6:30 a.m.
Duration: 30 minutes
Frequency: Weekly—Saturdays
Description:
This is an agricultural program produced by Auburn University which is educational and informative for the farmer. It presents a wide range of agricultural subjects of current interest and also instructs farmers on agricultural methods.

Problems:

AGRICULTURE

WSFA–TV will carry the Auburn University produced series *Dixie Digest* on a weekly basis.

TWELVE O'CLOCK REPORT

Time: 12:00 Noon
Duration: 2–3 minutes
Frequency: Five days per week
Description:
Agricultural market reports and weather reports.

Problems:

AGRICULTURE

WSFA–TV will continue to present early market reports and in-depth agricultural weather reports which have proven to be of continuing interest to the farmer.

TODAY IN ALABAMA

Time: 7:25 and 8:25 a.m.
Duration: 5 minutes
Frequency: Monday—Friday

TWELVE O'CLOCK REPORT

Time: 12:00 Noon
Duration: 30 minutes
Frequency: Monday—Friday

SIX O'CLOCK REPORT

Time: 6:00 p.m.
Duration: 30 minutes
Frequency: Monday—Saturday

TEN O'CLOCK REPORT

Time: 10:00 p.m.
Duration: 30 minutes
Frequency: Monday—Sunday
Description:

WSFA–TV's major local programming consists of its news programs. A professionally staffed and equipped News Department covers events throughout Alabama, with especial emphasis on activities related to Montgomery's state capital status. Decisions are made and events occur daily in the legislative, executive and judicial spheres that affect the lives of all Alabamians, and they are reported accurately, objectively and promptly by WSFA–TV. To augment its regular staff, the station employs reporters who reside in the larger communities of the service area. The station will employ qualified reporters in the major centers of Alexander City, Opelika and Eufaula to assure proper representation of the gain area on WSFA–TV news programs.

PUBLIC AFFAIRS ANNOUNCEMENTS

In addition to programming designed to treat specific problems, WSFA–TV adheres to a policy of soliciting and telecasting daily public affairs announcements. Through its full-time public affairs director, WSFA–TV will make public affairs announcements available to groups, organizations and governmental units which deal with problems uncovered in the gain area. Many of the problems related to unemployment, health care, education, racial understanding, agriculture, recreation and poverty can be handled very effectively using this medium. These announcements are often run adjacent to popular nighttime programs, assuring wide circulation. They can also be pinpointed to certain groups by placement within or adjacent to carefully selected programs.

27. Respondents propose findings to the effect that the programming proposed by Cosmos was still too vague and lacking in specificity, and that Cosmos had not met its burden of proof under the *Suburban* issue. Based on Mr. Villar's inability on the witness stand to recall any *mini-documentaries* that had ever been broadcast for the gain area, or to recall any recent ones that the station had carried, except one, and his acknowledgment that the choice of subjects for them would be the responsibility of the station's news director and not of top station management, respondents argued that the program does not meet the requirements of the *Primer*. Cosmos replied to this argument by pointing out that Mr. Villar, as general manager, does not produce this coverage himself and could not be expected to be intimately familiar with each night's coverage. The station also stated that it is not currently obligated to cover gain area problems although its coverage may include such events or circumstances, and that the mini-documentary concept gives it the opportunity for covering individual problems of small communities which would not be the subject of a full documentary otherwise.

28. With respect to *Capital News Conference*, the respondents point out that Mr. Villar could not say how many of these programs would be devoted to problems that had been ascertained in the gain area. Also, the fact that the program has been "cut back" from four times a month to twice a month raises questions as to whether the problems in the gain area can receive appropriate coverage in a program which

will only be broadcast half as often as it has been in the past. Cosmos contends, in reply, that rather than being "cut back," two time slots in which the program had been originally scheduled had been filled by *Rap Session* and *Feedback*, both of which are designed to treat problems of the gain area, and that a change in program style or format had been made rather than a reduction in public affairs coverage. Cosmos also states that nothing in the *Primer* requires an applicant to state how many times or how often a problem will be covered, but leaves the problems to be covered and the time to be devoted to each to the licensee's discretion.

29. In relation to *Rap Session* and *Feedback*, respondents point out that although Mr. Villar says these programs will be expanded to treat the problems of youth and others in the gain area, no provision has been made for bringing these persons to the studio from such far distances. In light of this, respondents contend that it would appear this program is designed to meet the needs of the present WSFA–TV service area rather than those ascertained in the gain area survey. In reply to this contention, Cosmos states that the current service area extends some fifty to sixty miles from Montgomery and the gain area is only a fifteen to twenty-mile extension of that area. WSFA–TV also points out that a resident of Auburn, Alabama, nearly sixty miles from Montgomery, has already appeared on the program *Feedback*, and that the respondents' argument is irrelevant to the issue as to whether these programs as proposed will meet the problems of the gain area.

30. Insofar as the *Daily Public Affairs Show* is concerned, respondents state that Mr. Villar could not identify any resident of the gain area among the proposed participants for the program who are listed in the exhibit. Cosmos' reply is to the effect that the record is replete with the gain area problems which will be covered on this program, and the fact a gain area resident is not identified by name in the exhibit is not required under any ascertainment standard nor is it relevant to the issue whether the problems will be treated as proposed.

31. Respondents charge that WSFA–TV's proposed *Documentaries* are meaningless and are not tied to the specific problems of the gain area. Besides, they state, the station proposes only one educational documentary a year and a single program annually devoted to the problem of recreation, neither of which is specifically tied to gain area problems. Cosmos counters this charge by pointing to the major WSFA–TV documentary that it proposes as the result of a comment by Mrs. Delores Carmichael, a young Extension Home Agent in Monroeville within the gain area, who expressed concern about a major problem—"motivating young black people to aspire to a better education."

32. In its reply to the proposed findings of fact filed by the parties, the Broadcast Bureau takes the view that Cosmos has met all current Commission requirements relating to the ascertainment of community problems of the proposed gain area. The Bureau says that Cosmos has adequately specified the programs it proposes to meet particular community needs and, in addition, has satisfied other questions raised by the Review Board.

Ultimate Findings and Conclusions

Programming

1. This case is before the Examiner on limited aspects of the amended showing made by Cosmos to ascertain the problems of the gain area proposed in the application which is the subject of this proceeding. The Review Board has determined that both the surveys of community leaders and the general public were "properly conceived and administered" by Cosmos. In addition, the Board found that Cosmos had contacted groups and leaders representative of the demographic characteristics of the area. However, the Board believed the programming showing made by Cosmos was too vague and lacked the specificity required by the *Primer*. In support of this, the Board cited the language of the answer to Question 29 of the *Primer* which stated that "the applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it."

2. The answer to Question 29 contains the further suggestion that it would be appropriate for the applicant to list the broadcast matter and, after it, the problems to be treated by this programming material. Cosmos has followed this suggestion in submitting its clarification of the programming which WSFA–TV proposes to utilize to cover the problems of the gain area. Thus, each program was listed individually by title, time, duration, frequency and description, with the problems to be treated associated with the program.

3. In order to determine whether Cosmos has complied with the *Primer's* requirements in respect of programming proposed to meet community problems, the *Primer* and its companion *Report and Order*, *supra*, contain certain guidelines for making this determination.

4. It must be remembered that the *Suburban* issue in this case centers around the ascertainment of a proposed gain area and not the community of license of the applicant. In this respect the Commission stated that because an applicant's obligation to ascertain community problems outside his city of license is secondary, an applicant is expected to be responsive to only major problems in that area. Considerable discretion has been vested in the applicant to select what problems he intends to cover and how he intends to treat them. He may choose to meet as many problems as he believes he can and he may be selective in his treatment. In showing what broadcast matter is proposed to treat what problems, the Commission has asked for specificity, and the record reveals that Cosmos has provided that specificity by listing the major problems to be treated in the specific programs after each such program.

5. The Commission has not established rigid standards for determining how many programs or segments of a program must be devoted to particular problems. Rather, this is left to the applicant's discretion. Additionally, the time that programs are to be presented is left to the discretion of the applicant with the limitation that programs should be presented at times when they could be expected to be effective. Also, the choice of broadcast matter is left to the discretion of the applicant, as the Commission requires only that the matter broadcast be responsive to the problems of the service area.

6. The findings reveal that the weekly prime time-programs, *Capital News Conference*, *Rap Session* and *Feedback*, will be used by WSFA–TV to cover most of the gain area problems which the station has selected to be treated. In addition, specific documentaries on education, racial understanding and the environment will be shown in prime time Agriculture will be covered weekly on two half-hour programs. These half-hour or hour programs will be complemented by a daily public affairs program, by WSFA–TV's extensive news programming, which includes the mini-documentary, and by public service announcements. In the aggregate, these specific programming proposals offer a flexible format for treating problems as they continually arise.

7. WSFA–TV also expressed its intention to affirmatively seek out spokesmen from the gain area who could assist the station in treating the problems to be covered. In this respect, in addition to specific invitations to individual guests, on-the-air announcements will be made about the opportunity to appear on *Feedback*.

8. The use of the mini-documentary in a news program by WSFA–TV provides an opportunity to cover small events, interests or problems which would not be appropriate for a full documentary. The fact that the mini-documentary will also deal with solutions to problems in individual presentations or in a series of productions offers more than the normal news story, and offers the opportunity for coverage of many "less than major" problems. The *Daily Public Affairs Show* of the station is another program on which specific problems will be covered. This five-minute program also offers an opportunity to cover a wide variety of problems.

9. There is nothing in this record that would indicate that WSFA–TV will not be responsive to the problems affecting the black population in the gain area. On the other hand, there is substantial evidence that the problems of the blacks will receive particular attention through the station's programming, both in special documentaries and in programs like *Capital News Conference*, *Rap Session* and *Feedback*. For example, various aspects of unemployment, racial understanding and recreation were singled out by black community leaders and black members of the general public. The problem of black unemployment will be covered on *Capital News Conference*, *Feedback* and *Rap Session*. Racial understanding is the subject of an entire documentary and a panel discussion program, in addition to coverage on the three programs listed above. Recreation from the black viewpoint will be treated on a specific documentary, as well as on *Rap Session* which is devoted to problems of youth, both black and white, and on *Capital News Conference*. Motivating young blacks to obtain a better education was specifically mentioned as a problem, and will be the subject of a major WSFA–TV prime-time documentary on education.

10. Based on the foregoing findings, it is concluded that Cosmos has adequately satisfied the requirements of the *Suburban* issue and the *Primer* with respect to specificity of its programming. It has given the title, time, duration, frequency and description of the programs it proposes, and the problems to be treated are associated with each program. It has ascertained the problems associated with the gain area and has proposed programming to deal with those problems. A substantial part

of that programming will be telecast in prime time when it will be effective in reaching a large audience. In short, Cosmos has proposed programming that will be responsive to the problems of the gain area, including those of the black community, and the variety of programs proposed by WSFA–TV enables it to cover the lesser problems of the outlying communities as well as the major problems facing the gain area.

The Community Leader Survey Questionnaire

11. In addition to requiring examination of WSFA–TV's programming proposed to meet community problems, the Review Board also permitted exploration of what it called "defects" which "alone would not call for further hearings." These "defects" involved first, whether the community leader survey was marred by "limiting the interviewee to listing only three or four community problems." The testimony in this proceeding is uncontroverted that no restraints were put on the person being interviewed. The findings show that the conduct of the interview was discussed among team members who were instructed on probing the interviewee. Team members were also given guidance by a staff memorandum, and during a conference which preceded the actual survey. These instructions enabled WSFA–TV personnel to develop in-depth interviews of community leaders in the areas chosen to be surveyed. Mr. Villar testified as to the character of his personal surveys while participating in the overall community leader survey, and stated that these interviews were conversational in manner and no attempt was made to limit the response of the interviewee in any manner. He also testified as to his conversations with other interview team members who indicated that they did not attempt to restrict the interviews. A review of the number of leaders interviewed and the number of problems identified shows that the community leader survey produced significant and substantial results.

12. In view of the foregoing facts, it is found that the possibility of producing any negative effect from phrasing the first question in the questionnaire in terms of asking for three or four most pressing problems has been effectively negated. In the context of the personal interview, it is ultimately found that the first question served a distinctive purpose as an "icebreaker" to encourage the person to divulge information. Furthermore, it would appear that the form of the question is not inconsistent with the Commission's guidelines for ascertaining problems in outlying or gain areas to the extent that ascertainment need not be as inclusive or exhaustive, that only those leaders who had a broad overview of the community need be interviewed, and that an applicant need be responsive to only major problems in outlying areas.

13. Upon the above basis it is concluded that the information which WSFA–TV obtained through its interviews with community leaders more than adequately fulfilled the Commission's goal of ascertaining community problems in the proposed gain area, and that the phrasing of the question did not limit or inhibit their responses.

Phraseology of the General Public Survey

14. The Review Board also permitted exploration of what it considered a "defect" in the general public survey questionnaire, the

language referring to the questionnaire as being taken for "some professors at the University of Alabama." Although the Board referred collectively to this and the first question in the community leader survey as "defects," they stated that these matters "alone would not call for further hearing." The findings reveal that from Dr. Hewett's testimony, it at least could be inferred that a defect might have been assigned to the general public survey form if WSFA–TV *had* been identified as the sponsor of the project. Because the primary goal of the structure of the questionnaire was to attain objectivity, identification of WSFA–TV was rejected by Dr. Hewett and his colleagues at the University. The record shows that Dr. Hewett's education and experience entitle his opinion as to the efficacy of the introductory statement in the questionnaire and as to the possibility of bias one way or the other, to great weight. Furthermore, his opinion and those of his colleagues remain uncontroverted.

15. It is noted that the Commission also recognized the possibility of this type of broadcast-related bias when it observed in the *Report and Order* that many individuals, when consulting with broadcast applicants, either jump to the conclusion that the applicant is seeking program proposals or they express problems in terms of exposure or publicity for themselves or their organization. This could be cured during the community leader consultation where station management can sit down with the individual and discuss problems, however, in a canvass of the general public, more objectivity is created when the man on the street is not given the chance to identify with the station. As Dr. Hewett pointed out, objectivity is the primary purpose for not identifying the sponsor as a general rule in surveying the general public, and the findings show that the results of the general public survey support the efficacy and objectivity of the survey. The collection and identification of some 27 problems from 400 respondents provided the applicant with much data, and comparison of this data with the data received from the community leader survey resulted in the collection of notably similar concerns alike from community leaders and the general public. The survey results in each case rebut any concern about the *form* of the questionnaires used.

16. From the foregoing it is concluded that the phraseology of the general public questionnaire was not intended to, nor did it, mislead the interviewees, and the results that were obtained support the purpose of the survey. Even if it were conceded, *arguendo*, that the language was not perfect, it had no material effect on the survey or the results obtained therefrom, and Cosmos was able to ascertain the problems affecting the gain area.

17. To summarize the foregoing findings and conclusions with respect to the *Suburban* issue, it has been concluded that Cosmos has met all current Commission requirements relating to the ascertainment of community problems of the proposed WSFA–TV gain area. It has adequately specified with particularity the programs it proposes to meet the gain area needs and problems, and such programs will be responsive to those problems which affect both black and white alike. It has also been concluded that the language contained in the community leader and general public survey questionnaires did not limit

or inhibit the responses, nor was such language intended to, nor did it, mislead the persons interviewed. Thus, Cosmos has sustained its burden of proof with respect to the *Suburban* issue and the other questions raised by the Review Board.

18. Upon the basis of the foregoing findings and conclusions, and the entire record in this case, it is ultimately concluded that a grant of Cosmos' application to relocate its transmitter site and increase its transmitter height should be made, and that such grant would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that, unless an appeal to the Commission is taken by any of the parties or the Commission reviews this Supplemental Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Cosmos Broadcasting Corporation for a move of its transmitter site to Grady, Alabama, and to increase its antenna height above average terrain, BE, and the same is, GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Hearing Examiner.*

F.C.C. 73-588

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re acceptance for filing of APPLICATIONS FOR CONSTRUCTION PERMITS FOR NEW TELEVISION BROADCAST STATIONS TO OPERATE ON CHANNEL 7, RAPID CITY, S. DAK., AND CHANNEL 5, LEAD, S. DAK.

JUNE 1, 1973.

The Commission by Commissioners Burch, (Chairman) Robert E. Lee, Johnson, Reid, Wiley and Hooks, with Commissioner H. Rex Lee concurring, issued the following PUBLIC NOTICE:

APPLICATIONS WILL BE ACCEPTED FOR FILING FOR CONSTRUCTION PERMITS FOR NEW TELEVISION BROADCAST STATIONS TO OPERATE ON CHANNEL 7, RAPID CITY, S. DAK., AND CHANNEL 5, LEAD, S. DAK.

The Commission's decision (32 FCC 2d 196), which denied the applications of Eli and Harry Daniels, d/b/as The Heart of the Black Hills Stations, for renewal of the licenses of television broadcast stations KRSD-TV, channel 7, Rapid City, South Dakota, and KDSJ-TV, channel 5, Lead, South Dakota, will become final within a short period of time. In accordance with the Commission's decision, notice is hereby given that on the day of May 31, 1973, the Commission, on its own motion, waived section 1.516(c) of the Commission's Rules, and accepted for filing the following commercial television applications.

Dakota Broadcasting Co., Inc. (New) Rapid City, S. Dak.	Ch-7, 174-180 MHz ERP: Vis. 196 kW, Aur. 19.6 kW HAAT: 744 ft. Coordinates: 44-04-06 103-15-03
Dakota Broadcasting Co., Inc. (New) Lead, S. Dak.	Ch-5, 76-82 MHz ERP: Vis. 100 kW, Aur. 10 kW HAAT: 1900 ft. Hrs. of Oper.: Proposed satellite of Ch-7, Rapid City, S. Dak. Coordinates: 44-19-40 103-50-05

Notice is also given that other interested parties may file applications for either or both channels. The Commission will also accept requests, pursuant to section 1.592(b) of the rules, for joint interim operating authority for either or both channels. In order to promote the orderly conduct of the Commission's business, the Commission has

determined to fix a date certain after which no new applications for either or both channels will be accepted for filing. Therefore, notice is hereby given that, in order to be entitled to comparative consideration, applications for construction permits for new television broadcast stations to operate on channel 7, Rapid City, South Dakota, and/or channel 5, Lead, South Dakota, and any applications for joint interim operating authority for either or both channels, must be substantially complete and tendered for filing no later than July 16, 1973.

F.C.C. 73R–217

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of OLIVER M. DUTY, JR., 3713 AMERICAN MANOR, LITTLE ROCK, ARK. Order To Show Cause Why The License for Radio Station KQR–4288 in the Citizens Radio Service Should Not Be Revoked	Docket No. 19341

APPEARANCES

Guy Jones, Jr., on behalf of Oliver M. Duty, Jr.; and *Arthur A. Anthony*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted June 12, 1973; Released June 14, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND PINCOCK.

1. Revocation of Oliver M. Duty, Jr.'s license in the Citizens Radio Service has been proposed in an Initial Decision released July 14, 1972, (FCC 72D–47); exceptions were filed by the licensee on December 1, 1972, and the Safety and Special Radio Services Bureau submitted a reply on December 11, 1972. Oral argument has not been requested, and the Review Board does not regard argument as necessary to a final resolution of the case. After carefully reviewing the Initial Decision in light of the exceptions and the hearing record, it is concluded that revocation of Mr. Duty's license is warranted. The Judge's findings and conclusions are adopted except to the extent modified herein and in the rulings on exceptions.

2. At the outset, it is pointed out that there was clear and unequivocal identification of the licensee's voice as that which was heard by the Commission's inspectors on the night of July 29, 1971. *Richard U. Patillo*, 34 FCC 2d 386, 24 RR 2d 68 (1972); and *Bobby R. Owens, Sr.*, FCC 73R–138, 40 FCC 2d 330. Said inspectors, as shown by the record, were qualified by training and experience to reach that determination. The major point treated in the exceptions bears on the Judge's rejection of Mr. Duty's alibi that he could not have made the transmissions that were the basis for the show cause order because he was out of town in Fort Smith, Arkansas, on that night. We have

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carefully studied the evidence bearing on this question, including the testimony of the operator of the motel where Mr. Duty purportedly stayed, and can find no basis for altering the Judge's findings (paragraphs 17 and 18) and conclusions (paragraph 1) on this point. In addition to the facts relied on by the Judge, the Board notes that one of the Commission employees who inspected Mr. Duty's station testified that Duty stated at the time his station was inspected that perhaps he had returned home the evening of the 29th of July, the evening on which the transmissions were heard. The Board also finds no grounds for altering the Judge's findings and conclusions concerning the testimony of Mr. Lee. Mr. Lee is an acquaintance of Mr. Duty, was one of the persons with whom Mr. Duty was heard communicating on July 29, and was himself at the time he testified subject to charges of improper operation of his Citizens Radio station. Moreover, Lee conceded that he "couldn't say truthfully that wasn't me" [1] on the tape of the communications made by the inspectors on the night of July 29. Therefore, the Board cannot agree with Duty that Lee, by his testimony, refuted the charges against Duty.

3. Accordingly, The Initial Decision IS AFFIRMED and Oliver M. Duty, Jr. is Ordered to Cease and Desist from further violations of Section 301 of the Communications Act of 1934, as amended, and of the Commission's Rules; and

4. IT IS FURTHER ORDERED, That the license of Oliver M. Duty, Jr., for Citizens Radio Station KQR–4288 IS REVOKED, effective August 2, 1973; and that a copy of this Order of Revocation SHALL BE SERVED by Certified Mail, Return Receipt Requested, upon Oliver M. Duty, Jr. at 3713 American Manor, Little Rock, Arkansas 72206; and

5. IT IS FURTHER ORDERED, That operation of Station KQR–4288 SHALL BE TERMINATED upon the effective date of the license revocation specified above, and that, immediately upon such effective date of such license revocation, the licensee shall forward the radio station license to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

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[1] TR 211.

NOTE.—Operation of the radio station specified above after the effective date of license revocation as ordered herein will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person operating such station to the penal sanctions specified in Section 501 of the Communications Act. Within thirty days of the release date of this Order of Revocation, a petition for reconsideration thereof by the Review Board may be filed pursuant to the provisions of Section 1.106 of the Commission's Rules, 47 CFR 1.106, or an application for review thereof by the Commission may be filed pursuant to the provisions of Section 1.115 of the Commission's Rules, 47 CFR 1.115.

RULINGS ON EXCEPTIONS OF OLIVER M. DUTY, JR.*

Exception No.	*Ruling*
1, 6	Denied. The exception is totally lacking in specificity, citation to the record or legal argument in support thereof.
2	Denied. The Judge's rulings on the discovery requests are consistent with the Commission's rules.
3, 4	Denied. The exception is not supported by the record and is totally lacking in specificity.
5	Denied. The exception fails to cite any legal basis for the request.
7, 9	Denied. The Initial Decision adequately and accurately reflects the record evidence.
8, 10, 11	Denied. For the reasons set forth in this Decision and in the Initial Decision.

*The exceptions are also denied for the failure to comply with the provisions of Section 1.277 of the Commission's Rules.

F.C.C. 72D-47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of OLIVER M. DUTY, JR., 3713 AMERICAN MANOR, LITTLE ROCK, ARK. Order To Show Cause Why the License for Radio Station KQR-4288 in the Citizens Radio Service Should Not Be Revoked	Docket No. 19341

APPEARANCES

Guy Jones, Jr., Esq., on behalf of Oliver M. Duty, Jr.: and *Arthur A. Anthony, Esq.*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

(Issued July 12, 1972; Released July 14, 1972)

1. On October 21, 1971, the Chief, Safety and Special Radio Services Bureau adopted and released an Order to Show Cause why the license held by Oliver M. Duty, Jr., in the Citizens radio service should not be revoked. This Order was based upon allegations that on July 29, 1971, the following violations were committed by Citizens radio station KQR-4288:

a. was used with a transmitting antenna which exceeded by more than 20 feet the height of the structure on which it was mounted, in wilful violation of Section 95.37(c)(2) of the Commission's Rules;

b. was used to transmit communications to other radio stations on the frequency 26.965 MHz (Channel 1), which is reserved for communications between units of the same Citizens radio station, in wilful violation of Section 95.41(d)(2) of the Commission's Rules;

c. was used as a hobby or diversion, i.e., as an activity in and of itself, in violation of Section 95.83(a)(1) of the Commission's Rules;

d. was used to transmit communications relating to signal strength, testing adjustments or capabilities of radio equipment, in violation of Section 95.83(a)(13) of the Commission's Rules;

e. was used to transmit communications for the benefit of, and/or in behalf of a person other than the licensee or members of his immediate family, in violation of Section 95.83(a)(14) of the Commission's Rules;

f. was used to transmit communications relating to advertising or soliciting the sale of goods or services, in violation of Section 95.83(a)(15) of the Commission's Rules;

g. was used to communicate with another Citizens radio station for a period exceeding five consecutive minutes, in violation of Section 95.91(b) of the Commission's Rules; and

h. was operated without being identified by its assigned call sign at the beginning and conclusion of each transmission, or series of transmissions,

and without identifying the stations communicated with by their assigned call signs, in wilful violation of Section 95.95(c) of the Commission's Rules.

It was also alleged that, on July 31, 1971, the licensee did not have a current copy of Part 95 of the Commission's Rules governing the Citizens radio service. Finally, it was also alleged that in reply to the Official Notice of Violation mailed August 26, 1971, the licensee ". . . misrepresented material facts to the Commission or concealed them from the Commission, or was lacking in candor in his statements to the Commission. . . ."

2. In the Official Notice of Violation which preceded the adoption of the Order to Show Cause, the licensee was charged with noncompliance of the Federal Communications Commission's Rules and Regulations similar to the alleged violations listed above which were the basis for the Order to Show Cause. Duty responded, August 31, 1971, to the Official Notice of Violation. He denied the violations charged. He said he was out of town on July 29, 1971, between 10:48 p.m., and 11:40 p.m., when the conversation upon which most of the violations were based was said to have taken place. He denied the charge that he violated Commission regulations by using an antenna which surpassed the specified height limitations. He admitted that the "Moonraker" antenna upon which the alleged violation was based was higher than permitted by the Rules for transmitting. He claimed that this antenna was not used for transmitting but that a smaller "Astroplane" antenna which is lower than the allowable maximum height of 20 feet was the one used by him for transmission. He admitted that he did not have a current copy of Part 95 of the Rules and Regulations but that he had placed an order with the Superintendent of Documents for a new subscription and he expected to receive a current copy soon.

3. Hearings on the Order to Show Cause were held in Little Rock, Arkansas, on February 7 and 8, 1972. Duty appeared and was represented by counsel. The record was closed on February 8, 1972. Proposed findings and conclusions were filed by counsel on behalf of the Chief, Safety and Special Radio Services Bureau and on behalf of Duty.

4. Oliver M. Duty, Jr., is the licensee of Citizens radio station KQR–4288. He has held his Citizens Band license for about 4½ years. His license will expire July 25, 1972. He has a base unit located in his home, a mobile unit which is installed in a company car assigned to him, and a walkie-talkie unit.

5. On July 29, 1971, his base unit consisted of a D–104 microphone and a Browning transmitter and receiver combination installed in his home. Outside, attached to his house, he had a Moonraker antenna and an Astroplane antenna. His mobile unit, installed in the company car, consisted of a Browning Eaglet with a whip antenna on the bumper.

6. Bruce Carl Doerle, Carlos Valle Roberts, and Edward Richard Jacobs hold degrees in electronic engineering and are employed by the FCC. They are assigned to a special taskforce assembled in Washington, D.C., to deal with enforcement of the Commission's Regulations governing the Citizens radio service. As of July 29, 1971, Doerle

and Jacobs had been employed by the Commission for just over two years and Roberts had been employed for just over a year.

7. During the week which included July 29, 1971, Doerle, Roberts and Jacobs and Jeffrey Anderson were in Little Rock for the purpose of monitoring Citizens radio transmissions. On the night of July 29, 1971, Anderson was at a base station set up by the taskforce in a motel in Little Rock. Doerle and Roberts were in a car equipped to locate the source of Citizens Band transmissions. At the base station Anderson was monitoring and taping a transmission which was also being taped by Doerle and Roberts in the car. This taping took place between 10:48 p.m. and 11:40 p.m., on the frequency 26.965 MHz, Channel 1, in the Citizens radio service. A transcription of the recorded conversation was made and it showed that a conversation took place over this period of time involving four individuals transmitting from different stations and locations. These conversations exceeded five minutes in length. At no time was any conversation preceded by the announcement of assigned call signs. Various pseudonyms were used in the course of the conversation.

8. During the conversation there was a discussion offering a PDL quad antenna for sale; a discussion dealing with the quality of the signals being transmitted; a discussion dealing with the purchase of wedding photographs; a discussion with a mobile operator asking that his parents be contacted to clear a garage so that he could get a load of furniture in out of the rain. In general, the hour was consumed with what might be described as conversation of a friendly social nature.

9. Messrs. Doerle and Roberts in the investigative vehicle proceeded to locate the source of the transmissions which were being recorded by them and by the base station. Their vehicle was equipped with two systems for locating transmitters. Initially, when they were some distance away from the location, they used their "sense system". This system consists of two antennas and a mobile directional comparator. A comparator is a box containing electric circuits which process signals received by the two antennas and a meter device which is driven by the mobile comparator circuit. This meter has a scale marked left and right with a zero position in the middle. The meter will deflect either to the position marked left or to the position marked right depending upon whether the transmitter, to which the antennas and the mobile directional comparator and receiver are tuned, is to the left or right of the vehicle. If the transmitter is dead ahead the meter will read zero.

10. To locate a transmitter the vehicle is driven on a zig-zag course until the meter is on a zero reading. Once on a zero reading the vehicle will "home" on the signal until a high signal frequency strength is indicated by a signal strength meter on the receiver. Once a high signal frequency strength is indicated the second system which is a device called a "snifter" is used. This is a small, hand-held battery powered, highly directional receiver.

11. The operator holds the snifter out of the window of the car and has an earphone plugged in his right ear. The snifter is rotated until

there is a null. This null is very sharp and occurs when the snifter is pointed directly toward the source of the radio emissions. Turning the snifter even slightly from the direction of the transmissions will eliminate the null. According to Roberts, the area of null would be about 10 feet to the right or left of the antenna from which the transmissions are emanating.

12. Using the foregoing system, Doerle and Roberts located one source of transmissions as 3713 American Manor Drive, the address of Oliver M. Duty, Jr. They recognized the voice emanating from the antenna located at 3713 American Manor Drive as the same voice they heard during earlier transmissions when they were driving to locate the source.

13. During the course of the investigation on the evening of July 29, 1971, the weather was overcast. Doerle and Roberts remained in the vicinity of Duty's house for several minutes making their observations while monitoring the transmissions which the Commission's inspectors alleged came from Duty's house. They heard a "ping" immediately before each transmission. According to their testimony this ping is a characteristic of some Browning transmitters including the transmitter found at Duty's house when his station was inspected subsequently. Doerle and Roberts also noticed a Moonraker beam antenna pointed in a southerly direction above the house on American Manor Drive.

14. Doerle and Roberts did not inspect Duty's station on the night of July 29, 1971. Lights in the house were on and they were both aware that under Commission Regulations a CB station must be made available for inspection upon request at reasonable hours. They knew that any time a station is transmitting is considered a reasonable time to conduct an inspection. Doerle and Roberts did not conduct an inspection out of concern that, if their presence were known to any CB operator in the Little Rock area, others would be warned and would go off the air thereby nullifying the purpose of the taskforce.

15. On July 31, 1971, Doerle and Jacobs presented themselves at Duty's home at about 3:00 p.m., for the purpose of inspecting his station. Duty was not at home and his wife asked them to come back in an hour. They returned at about 4:10 p.m., and Duty allowed them to inspect his equipment. Based upon his conversation with Duty at this time Doerle was convinced that it was his voice that they had heard during the monitoring operations on July 29, 1971. Voice identification was said to be based upon Duty's distinctive accent and his tendency toward slurring his words. Neither Doerle nor Jacobs had ever met or spoken with Duty before this time. Identification of Duty was made on the basis of the meeting on July 31, 1971 and hearing him talk at the time of the hearing on February 7 and 8, 1972. According to the inspectors when they told Duty that his station had been monitored and located as a source of transmissions on July 29, 1971 Duty denied that he was transmitting, saying that he had been out of town.

16. According to Duty he is the only one authorized to use his Citizens Band radio equipment. He denied at the hearing that he was transmitting on the evening of July 29, 1971, as charged. He claims that he

and Jacobs had been employed by the Commission for just over two years and Roberts had been employed for just over a year.

7. During the week which included July 29, 1971, Doerle, Roberts and Jacobs and Jeffrey Anderson were in Little Rock for the purpose of monitoring Citizens radio transmissions. On the night of July 29, 1971, Anderson was at a base station set up by the taskforce in a motel in Little Rock. Doerle and Roberts were in a car equipped to locate the source of Citizens Band transmissions. At the base station Anderson was monitoring and taping a transmission which was also being taped by Doerle and Roberts in the car. This taping took place between 10:48 p.m. and 11:40 p.m., on the frequency 26.965 MHz, Channel 1, in the Citizens radio service. A transcription of the recorded conversation was made and it showed that a conversation took place over this period of time involving four individuals transmitting from different stations and locations. These conversations exceeded five minutes in length. At no time was any conversation preceded by the announcement of assigned call signs. Various pseudonyms were used in the course of the conversation.

8. During the conversation there was a discussion offering a PDL quad antenna for sale; a discussion dealing with the quality of the signals being transmitted; a discussion dealing with the purchase of wedding photographs; a discussion with a mobile operator asking that his parents be contacted to clear a garage so that he could get a load of furniture in out of the rain. In general, the hour was consumed with what might be described as conversation of a friendly social nature.

9. Messrs. Doerle and Roberts in the investigative vehicle proceeded to locate the source of the transmissions which were being recorded by them and by the base station. Their vehicle was equipped with two systems for locating transmitters. Initially, when they were some distance away from the location, they used their "sense system". This system consists of two antennas and a mobile directional comparator. A comparator is a box containing electric circuits which process signals received by the two antennas and a meter device which is driven by the mobile comparator circuit. This meter has a scale marked left and right with a zero position in the middle. The meter will deflect either to the position marked left or to the position marked right depending upon whether the transmitter, to which the antennas and the mobile directional comparator and receiver are tuned, is to the left or right of the vehicle. If the transmitter is dead ahead the meter will read zero.

10. To locate a transmitter the vehicle is driven on a zig-zag course until the meter is on a zero reading. Once on a zero reading the vehicle will "home" on the signal until a high signal frequency strength is indicated by a signal strength meter on the receiver. Once a high signal frequency strength is indicated the second system which is a device called a "snifter" is used. This is a small, hand-held battery powered, highly directional receiver.

11. The operator holds the snifter out of the window of the car and has an earphone plugged in his right ear. The snifter is rotated until

there is a null. This null is very sharp and occurs when the snifter is pointed directly toward the source of the radio emissions. Turning the snifter even slightly from the direction of the transmissions will eliminate the null. According to Roberts, the area of null would be about 10 feet to the right or left of the antenna from which the transmissions are emanating.

12. Using the foregoing system, Doerle and Roberts located one source of transmissions as 3713 American Manor Drive, the address of Oliver M. Duty, Jr. They recognized the voice emanating from the antenna located at 3713 American Manor Drive as the same voice they heard during earlier transmissions when they were driving to locate the source.

13. During the course of the investigation on the evening of July 29, 1971, the weather was overcast. Doerle and Roberts remained in the vicinity of Duty's house for several minutes making their observations while monitoring the transmissions which the Commission's inspectors alleged came from Duty's house. They heard a "ping" immediately before each transmission. According to their testimony this ping is a characteristic of some Browning transmitters including the transmitter found at Duty's house when his station was inspected subsequently. Doerle and Roberts also noticed a Moonraker beam antenna pointed in a southerly direction above the house on American Manor Drive.

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15. On July 31, 1971, Doerle and Jacobs presented themselves at Duty's home at about 3:00 p.m., for the purpose of inspecting his station. Duty was not at home and his wife asked them to come back in an hour. They returned at about 4:10 p.m., and Duty allowed them to inspect his equipment. Based upon his conversation with Duty at this time Doerle was convinced that it was his voice that they had heard during the monitoring operations on July 29, 1971. Voice identification was said to be based upon Duty's distinctive accent and his tendency toward slurring his words. Neither Doerle nor Jacobs had ever met or spoken with Duty before this time. Identification of Duty was made on the basis of the meeting on July 31, 1971 and hearing him talk at the time of the hearing on February 7 and 8, 1972. According to the inspectors when they told Duty that his station had been monitored and located as a source of transmissions on July 29, 1971 Duty denied that he was transmitting, saying that he had been out of town.

16. According to Duty he is the only one authorized to use his Citizens Band radio equipment. He denied at the hearing that he was transmitting on the evening of July 29, 1971, as charged. He claims that he

was in Fort Smith, Arkansas. He left for Fort Smith on the afternoon of July 29, 1971, and did not return until the next day. He took his daughter's car instead of the company car because he took care of some personal matters on the trip. For this reason he also paid the expenses of the trip personally.

17. To support his alibi Duty produced statements from the Continental Motel, Fort Smith, Arkansas, showing that he had checked in on July 29, 1971 and checked out on July 30, 1971. The motel receipts produced by Duty bore successive cash register transaction numbers. Ordinarily, about 60–70 transactions would be registered between the time a guest checked in and the time he checked out the next day. Receipts bearing successive numbers such as those produced by Duty would be the receipts that would conform with what would be given if by some error the original statement had to be cancelled or had been destroyed.

18. William C. Edwards, owner of the Continental Motel, was called as a witness by the Bureau. According to Edwards, Duty is a friend and has been a regular guest at his motel. Edwards had no personal knowledge or recollection that Duty was at the motel on the night of July 29, 1971, but he does not ordinarily see guests at the motel. Other records which would be prepared in connection with a guest's registration, such as a registration card, were not available because of a recent tornado which tore up the motel. This was also the reason Edwards did not have the copy of the receipt usually retained by the motel.

19. Duty listened to the tapes but he could not identify any voice he heard on the tapes. He had no recollection of having ever used the pseudonym "one" or having responded to the pseudonym "one". He said that he uses the Astroplane antenna for transmitting on his Citizens Band radio and the much taller Moonraker antenna is used only for receiving. He once owned a PDL quad antenna which he gave away. According to Duty there are about four or five other CB radio operators within about one or two blocks of his house. He uses his Citizens Band radio for keeping in touch with his automobile, particularly, since he's had several blowouts. He uses his base station primarily for monitoring on various channels and to make calls to persons out in mobile units.

20. He did not have a current copy of Part 95 when he was inspected, but Duty claims that this was due to his misapprehension that he would be notified when his subscription had ran out. When this deficiency was called to his attention, he immediately placed an order with the Superintendent of Documents for a current copy of Part 95.

21. Duty is acquainted with Charles Lee who is also a CB operator. Lee was also identified as a member of the group involved in the conversation, which is the subject of this proceeding. On the same night that the inspectors located Duty's home as a source of transmissions, they also located Lee's home at 700 Manchester Drive as another source of the transmissions being monitored. Lee appeared as a witness. Lee had no recollection of having been on the air at the time of the alleged conversation and he denied that he could recognize any of the voices

from the tapes made of the transmissions involved. Lee is a professional photographer who is required because of physical and nervous ailments to conserve his energy. He is rarely out after midnight, but it was his recollection that on the night of the alleged transmissions he was attending a wedding rehearsal.

CONCLUSIONS

1. Duty's home was located as one source of the monitored conversation by the use of direction finding techniques described in the findings. The techniques used were objective in that the investigators had no predetermined place they were out to find. They were led to Duty's home by their monitoring equipment and once at the site they stayed to confirm that Duty's house was the source of the signal they had been observing. Against the array of evidence presented by the Bureau there is Duty's claim that he was not at home on the night of July 29, 1971. His alibi is virtually unsupported. He has what purports to be a motel receipt evidencing that he was in Fort Smith, Arkansas. But this receipt is extraordinary and none of the usual substantiating evidence of his presence in Fort Smith is available. His company did not pay his expenses; he was not seen in Fort Smith by anyone; and the motel does not have any of the records that would be expected in the case of a guest who stayed there. We are compelled to conclude that the preponderance of evidence supports the conclusion that Duty was not in Fort Smith on July 29, 1971.

2. It is unfortunate that the inspectors did not choose to inspect Duty's radio facility on July 29, 1971. Such an inspection would probably have settled positively whether Duty was at home or away as he claimed. It is also regrettable that the reason for this failure to inspect arose out of a taskforce procedure to obtain maximum effectiveness by keeping their presence in Little Rock from becoming known. We must suspect that there was rampant violation by CB operators in the area. We are not concerned with the practices and procedures followed by the Bureau to enforce compliance with the Commission's Rules. The CB Rules are notable for the substantial number of "don'ts" or "no-nos" they encompass. It is a limited service meant for very limited use. It may well be that these limitations are so restrictive that we have reached a point where widespread disregard of the Rules by licensees may now be normal. We are not here to resolve policy for the Commission but counsel for the licensee did try to raise these points and some attention to them may well be justified.

3. In this case, failure to see Duty on July 29, 1971, in his house is not fatal to proof that he was involved in violation of the Rules. There is ample evidence from which to conclude that his facility was in operation and he was a party to the conversation which violated a number of the Commission's Rules. His voice was recognized and he admitted that he was the only one who used his CB radio facilities. Coincidentally, Lee turns out to be an acquaintance of Duty and Duty did own an antenna of the type discussed over the air. It must be concluded, therefore, that, on all the evidence, Oliver M. Duty, Jr., participated in a transmission in which he violated the Rules governing

the Citizens radio service. These violations were wilful, in that they were deliberate and contrary to the requirements of Rules which Duty was bound to know and observe.

4. Duty consistently denied the charges and it is his denials which are the basis of the charge of misrepresentation and lack of candor. On this point there may be room for doubt as to whether a further conclusion of misrepresentation is warranted. It is unnecessary for the purpose of determining that Duty's license should be revoked and, therefore, no conclusions will be reached as to whether under all circumstances Duty's denials of the charges were of the nature to justify a conclusion that he was guilty of misrepresentation.

5. Duty admits to the fact that he did not have a current copy of the rules but his explanation for this lapse was reasonable and he did take steps to correct this deficiency. This charge should not have been made under all the circumstances and it should now be dismissed.

6. Whether or not Duty was using the Moonraker antenna for transmission is a moot point at this stage. There are conflicting claims in this regard and there is admittedly a margin of 10 feet in either direction in the operation of the snifter. On this basis we will give Duty the benefit of the doubt and conclude that the Bureau has not sustained its burden of proof, on the charge that Duty was using an over-height antenna for transmission.

7. On all of the findings and the conclusions based thereon, it is adjudged that on the night of July 29, 1971, Oliver M. Duty, Jr., engaged in a transmission on the Citizens radio service frequency violating a number of the Rules and Regulations he was bound to observe. These violations were wilful and sufficient in total to warrant revocation of his license. It will be so ordered.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion the license of Oliver M. Duty, Jr., for Radio Station KQR-4288 in the Citizens Radio Service IS REVOKED, effective on the effective date of this Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION,
ERNEST NASH, *Hearing Examiner.*

F.C.C. 73-567

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
EDUCATIONAL BROADCASTING CORPORATION, LICENSEE OF STATION WNET(TV), NEW YORK, N.Y.
For Declaratory Ruling Concerning Announcements Re Charter Flights Sponsored By the Station

MAY 23, 1973.

EDUCATIONAL BROADCASTING CORP.,
Licensee of Station WNET(TV),
304 West 58th Street,
New York, N.Y. 10019

GENTLEMEN: This is in reference to your letter of March 28, 1973, requesting a declaratory ruling pursuant to Section 1.2 of the Commission's Rules.

You state that you are eligible under recently adopted CAB rules to organize low cost charter flights to Europe and that such activities are consistent with your Charter. Given these facts you state:

> WNET has reason to believe, were it to organize under the new 1972 CAB regulations a number of group flights abroad each year (e.g., to England, Spain, Norway, Greece or Israel) and were it permitted to make occasional mentions over the air that a flight to a given country some three months hence was being organized, it could derive a not insubstantial amount directly from this travel service, as well as introduce many to the station who might not otherwise contribute or wish to keep apprised of station activities.

You further state that no airlines, travel agencies, hotels or restaurants would be mentioned over the air. Announcements similar to the following are contemplated:

> 1. "Viewers, how about going to London and Paris in the Spring? Channel 13 is sponsoring a flight in April (1974). If you would like to be in on it, just call or write . . ."
> 2. "When you join Channel 13, you'll get IMAGE, our membership magazine. In it every month are listed all the fabulous low-cost trips which Channel 13 viewers are invited to take. So why not join now?"
> 3. "Channel 13 is now taking reservations for low-cost charter flights to Europe this Spring. They will be leaving for London and Paris every week throughout April. Each is a 13-day package which includes fine hotel accommodations, fabulous nights at concerts and the theater, etc. If you would be interested in these trips write for our brochure which gives you all the details. Here's the address . . ."
> 4. "Channel 13 is organizing a wonderful 10-day trip to Hawaii, leaving New York on February 2nd, 1974. Single person airfare is $362 assuming the plane is full. There would be an extra charge of $26 if the plane is at four-fifths capacity, the minimum CAB requirement. Channel 13's Hawaii package also includes your hotels and other land arrangements for $111. In addition there is a $25 service charge covering the expenses of organizing the trip. All told: $526 for a fabulous Channel 13 trip. To sign up or get further information, write . . ."

You state that all earnings from this charter service, after expenses, will be used to finance WNET's programming and membership development. You request a ruling as to whether occasional announcements such as those set out above are permissible.

Section 73.621(e) of the Rules provides in part:

> Each station shall furnish a nonprofit and noncommercial broadcast service. However, noncommercial educational television stations shall be subject to the provisions of Section 73.654 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others, except that no announcements (visual or aural) promoting the sale of a product or service shall be broadcast in connection with any program . . .

Similar language as to educational FM stations appears in Section 73.503(d).

Although not contained in WNET's written request, it has been suggested that the prohibition against the broadcast of announcements on educational stations that promote the sale of goods or services refers only to "programs produced by, or at the expense of, or furnished by others." This interpretation overlooks the word "noncommercial" in the first sentence of the quoted rule, and would permit commercial announcements during programs produced by the station from its general operating funds and between any programs. We reject that interpretation.

There are many ways used by educational stations to raise funds, including over-the-air solicitation of funds and auctions. However, the Commission has never permitted the promotion of the sale of goods and services over the air. Even during auctions, when the Commission's requirements are somewhat relaxed, the products or services auctioned may not be promoted "beyond that necessary for specific auction purposes," Note 4 to Section 73.621. The proposed announcements clearly promote the sale of a service; in fact, a commercial service. Thus, while recognizing that your proposed announcements would serve to raise funds for Station WNET(TV), we must conclude that they are inconsistent with the noncommercial nature of educational stations and the provisions of Section 73.621 of the Commission's Rules.

By Direction of the Commission,
Ben F. Waple, *Secretary*.

F.C.C. 73-549

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Requests by
ENCYCLOPEDIA BRITTANICA EDUCATIONAL CORP.
ROBERT O. ANDERSON, ROSWELL, N. MEX.
RALPH O. BRISCOE, TARRYTOWN, N.Y.
For Waiver of Divestiture Conditions in the Columbia Broadcasting System, Inc. and Viacom International, Inc. Matter

MAY 23, 1973.

MR. ROSS D. SACKETT,
Encyclopedia Brittanica Educational Corp.,
425 Michigan Avenue,
Chicago, Ill. 60611
MR. ROBERT O. ANDERSON,
Box 1000,
Roswell, N. Mex. 88201
MR. RALPH O. BRISCOE,
Five Suncliff Drive,
Tarrytown, N.Y. 10591

GENTLEMEN: This refers to your separate requests dated March 27, April 12 and May 10, 1973, respectively, for waiver with respect to the diverstiture conditions set forth in the Commission's June 1971 decision concerning Columbia Broadcasting System, Inc. and Viacom International, Inc. (*Columbia Picture Industries, Inc.*, 30 FCC 2d 9), and of your separate commitments pursuant to that decision to divest yourselves of all Viacom stock received in the CBS–Viacom "spin-off".

It appears that you, as CBS directors and in two instances vice-presidents at that time and previously, were included in the categories of individuals to whom the conditions applied. However, according to your letters, all of you either have terminated any connection with CBS, or will do so by June 1, 1973, and none of you has any intention or prospect of again becoming an officer, director or employee of that company. Each of you states that his holdings of CBS and Viacom stock are well under the 1% bench mark which the Commission considers, here and elsewhere, to be significant even in the absence of officer or director status (including both the shares now held, those due under deferred compensation plans, and in one case those which may ultimately be received under a Performance Share Unit plan). It appears that the largest possible holding, including shares in the latter categories, is some 13,206 shares or about 0.5% of CBS voting stock.

Therefore it appears that the factors, which led to the conditions mentioned, no longer apply in your cases and that waiver is warranted. However, it appears appropriate to condition such waiver in each case on the individual not acquiring a position with CBS, in the future, which falls within the categories set forth in the decision as subject to the condition.

Accordingly, waiver of the conditions imposed on CBS officials in the *Columbia Picture Industries, Inc.* decision (30 FCC 2d 9, June 1971), and of your commitments to divest yourselves of Viacom stock entered into pursuant thereto, is granted. However, this waiver shall cease to apply to any of you, who at any time again becomes an officer or director of CBS, or otherwise becomes a member of the group of individuals to whom the conditions were applied in that decision.

BY DIRECTION OF THE COMMISSION*
BEN F. WAPLE, *Secretary.*

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*Commissioner Johnson not participating.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint by
DIOCESAN UNION OF HOLY NAME SOCIETIES OF ROCKVILLE CENTRE AND LONG ISLAND COALITION FOR LIFE
Concerning fairness complaint Re Station WCBS–TV, New York, N.Y.

JUNE 12, 1973.

EUGENE JAMES MCMAHON, ESQ.,
Bank Building,
103–42 Lefferts Boulevard,
Richmond Hill, N.Y. 11419

DEAR MR. MCMAHON: Your letter of complaint on behalf of the Diocesan Union of Holy Name Societies of Rockville Centre and the Long Island Coalition for Life against Station WCBS–TV, New York, New York, dated February 9, 1973 and addressed to Chairman Dean Burch, has been referred to this office for review and reply.

In particular, your complaint concerns a two-part episode of the program "Maude" broadcast by WCBS–TV on November 14 and 21, 1972 which portrayed Maude's discovery that she was pregnant and her decision to have an abortion. You allege that these programs "espoused a pro-death position by promoting abortion," citing the following lines of dialogue in support of this contention:

WALTER: . . . now that you mention it, it [abortion] is legal in New York, isn't it?
CAROL: Of course it is Walter! Mother, I don't understand your hesitancy. When they made it a law you were for it . . .
We're free. We finally have the right to decide what we can do with our own bodies. . . .
And it's as simple as going to the dentist. . . .
It's a simple operation now. But when you were growing up it was illegal and it was dangerous and it was sinister and you've never gotten over that. . . .
Mother, you don't have to have the baby. Look. I've told you before there's no reason to feel guilty and there's no reason to be afraid. * * *
WALTER: Maude, I think it would be wrong to have a child at our age.
MAUDE: Oh, so do I. Walter. Oh Walter, so do I.
WALTER: We'd make awful parents.
MAUDE: Oh, impatient, irrascible. For other people it might be fine, but for us. I don't think it would be fair to anybody. . .
WALTER: Are you frightened, about the operation, I mean. . .
MAUDE: Honey, its alright. Just tell me. Walter, I'm doing the right thing not having the baby.
WALTER: For you, Maude, for me, and for the privacy of our own lives, you're doing the right thing.

You have submitted copies of correspondence with the CBS Television Network indicating that the organizations which you represent

requested that "fairness" and "personal attack" time be afforded for the presentation of a "pro-life" program "within the framework of the 'Maude' show" or that time be made available to the groups to broadcast a "pro-life presentation," and that such request was refused by CBS for the stated reason that "In light of the obviously fictional and satirical context of the series," the programs in question were "solely intended for entertainment and not for the discussion of viewpoints on controversial issues of public importance," and therefore did not raise any obligations under the fairness doctrine or the Commission's personal attack rule.

Your complaint presents "a demand for fairness time on the ground that abortion is a major controversial issue and that two pro-life programs be presented on successive Tuesday evenings at 8 p.m. on CBS national network within the framework of the 'Maude' show supporting the right to life of unborn babies, or that time be made available on successive Tuesday evenings at 8 p.m. on CBS national network for a pro-life presentation produced by appellants herein," and also "a demand for personal attack time predicated upon a violation of Section 73.123 [of the Commission's Rules and Regulations] in that WCBS-TV and the producers of 'Maude' have attacked an identified group, namely, all present and future unborn children."

If a station presents one side of a controversial issue of public importance, it is required under the fairness doctrine to afford reasonable opportunity for the presentation of contrasting views. Reasonable opportunity does not mean equal time, and the licensee has discretion in determining such matters as format, time of presentation, and appropriate spokesmen for the expression of contrasting views. Where complaint is made to the Commission alleging that a station or network has failed to comply with the fairness doctrine, the Commission's procedures require the complainant to submit specific information including, *inter alia:* (1) the specific issue of a controversial nature of public importance which was broadcast; (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; and (3) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming. Your complaint and CBS's response to your requests raise an issue as to whether the two-part "Maude" episode in question presented one side of a controversial issue of public importance within the meaning of the fairness doctrine. However, assuming *arguendo* that the program did so, you have not provided the Commission with any information indicating that the station has presented only one side of such issue in its *overall* programming. In this regard, it should be noted that there is no requirement in the fairness doctrine that a licensee present contrasting views within a single broadcast or even in the same series of programs, and that no particular person or group is entitled to appear on the station, since the fairness doctrine is designed to insure the right of the public to be informed rather than the right of any individual to broadcast his views. It is the licensee's overall programming which is looked to in order to determine whether opposing views have been afforded an opportunity for

expression. Therefore, before the Commission can take appropriate action on your complaint, it must receive specific information setting forth reasonable grounds for the conclusion that the licensee, in its overall programming, has not afforded reasonable opportunity for the presentation of contrasting views on the particular controversial issue of public importance involved. See *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969).

The personal attack aspect of the fairness doctrine is codified in the Commission's rules, and is designed to insure that an attack upon the character of a party to debate on a controversial issue can be answered by that party. Thus, when during the presentation of views on a controversial issue of public importance, an attack is made upon an identified person or group, the Commission's personal attack rule requires the licensee to notify the person or group attacked, to send a recording, transcript, or as accurate a summary as possible, and to afford an opportunity for a response. A personal attack, as defined by the rule, is an attack "upon the honesty, character, integrity or like personal qualities of an identified person or group." Your complaint alleges that the two-part "Maude" episode in question "attacked an identified group, namely, all present and future unborn children." However, the type of "attack" you are concerned with does not come within the rule as set forth above.

For the foregoing reasons, it does not appear that Commission action is warranted on your complaint at the present time. Should you provide the Commission with specific detailed information to support a claim that the licensee has failed in its overall programming to comply with the fairness doctrine, further consideration will be given your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(For Chief, Broadcast Bureau).

109-044—73——5

F.C.C. 73-609

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
HORACE P. ROWLEY III, NEW YORK, N.Y.
For Declaratory Ruling Concerning CBS
News Program, Re fairness doctrine

JUNE 6, 1973.

HORACE P. ROWLEY, III, ESQ.,
416 East 81st Street,
New York, N.Y. 10028

DEAR MR. ROWLEY: This is in reference to your motion dated February 26, 1973 that the Commission "issue the following declaratory ruling in order to terminate a controversy and remove uncertainty":

If CBS broadcasts Eric Sevareid's Views on an issue of public importance during the *CBS Evening News With Walter Cronkite*, then the public has a right against CBS to receive a conflicting view back-to-back during the same program.

In your correspondence you state that the CBS Evening News program is broadcast by more than 200 affiliated stations from coast-to-coast; that during the CBS Evening News Mr. Sevareid is the only spokesman who comments on news events; that Mr. Sevareid determines the subject to be discussed and the views to be presented; that CBS does not afford this opportunity on its Evening News program to any other spokesmen to present opposing viewpoints; that Mr. Sevareid is classified by the public as "a member of the 'eastern, liberal establishment' "; that "CBS claims that the American public receives most of its information on issues from CBS News"; that in order for the public to be well informed it must "receive a spectrum of conflicting views" on important issues; that in a letter to CBS dated January 9, 1973 you requested that it increase the number of commentators on each edition of the CBS Evening News to at least two by January 31, 1973 and that the additional spokesmen be used to present opposing views to those of Mr. Sevareid; that your request was denied by CBS; and that denial creates "both a controversy and uncertainty about CBS's duty to the public."

You state that the issue is whether the public has a right against CBS to receive an opposing view back-to-back to the views expressed by Mr. Sevareid on the CBS Evening News; that Section 315(a), which embodied Congressional approval of the fairness doctrine, applies to networks; that back-to-back commentaries are the "only 'reasonable opportunity' " under Section 315(a) because in order for the public to decide between conflicting views it must be able to hear and compare these views at the same time; that the public's right

to receive back-to-back views during the same program is based on the freedom of speech clause of the First Amendment and 47 U.S.C. 326; that under the freedom of speech clause the public has a right to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969); and that "Section 326 of the Communications Act protects the public's freedom of speech, not the broadcaster's freedom of the press."

The broadcast system which Congress established has been fully described in such landmark decisions as *National Broadcasting Company* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co., Inc.* v. *FCC*, *supra*. This system was based upon the unique nature of radio, in that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." *NBC* v. *U.S.*, *supra*, at 226. Congress created a system of licensing private entities for short terms, and made it incumbent upon them to operate their facilities in the public interest. As the court stated in *Red Lion*, *supra*, at p. 394, licensees are ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, and are obligated to give suitable time and attention to matters of great public concern."

The Commission has consistently stated that, with some exceptions not applicable to this case, the licensee has discretion in discharging his public interest obligation. The Commission in its *Editorializing Report*, 13 FCC 1246 (1949), stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests of time, the station will inevitably be confronted with such questions as to whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . .

The fairness doctrine is designed to require that reasonable opportunity be afforded for contrasting views without unduly burdening the licensee so as to discourage the broadcast of "robust wide-open debate." See *The New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). That policy has been reiterated in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416, and its 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960).

As explained to you in previous correspondence,[1] the fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting views by responsible spokesmen. A station need not present contrasting views on the same program; the opportunity may be afforded in the station's overall programming, including

[1] See letter to Horace P. Rowley, III, Esq., —— FCC 2d —— (January 30, 1973).

news programs, interviews, debates, speeches and the like. The purpose of the doctrine is to promote the fullest possible debate on public issues, to the end that the public will be informed. The fairness doctrine does not require precise equality in opportunity such as required for candidates for public office, but rather that reasonable opportunity be afforded, nor does it require a separate opportunity for every shade of viewpoint.

The critical issue in fairness doctrine cases is whether opposing spokesmen are given a reasonable opportunity for the expression of their viewpoints in the station's or network's overall programming, not whether opposing sides of a topic are presented in the same program. The Commission does not agree with the contention that the achievement of fairness requires the presentation of opposing views on the same program. Thus we reject your contentions that back-to-back commentaries on CBS Evening News are required in order to "afford reasonable opportunity" under Section 315 of the Communications Act.

You also cite Section 326 of the Communications Act as justification for your view that the Commission should require CBS to broadcast commentaries back-to-back. We believe your reliance on Section 326 is inapposite to this situation. Section 326 clearly is intended to prohibit Commission censorship of broadcast matter and not to duplicate or expand the specific statutory requirement of Section 315(a) that licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Accordingly and for the reasons set forth above, your request for a declaratory ruling IS DENIED.

Commissioner Johnson concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73R-225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	Docket No. 18437
JAMES B. FRANCIS, LAS VEGAS, NEV.	File No. BPH-6435
QUALITY BROADCASTING CORP., LAS VEGAS, NEV.	Docket No. 18438
For Construction Permits	File No. BPH-6522

APPEARANCES

Gene A. Bechtel, Thomas Schattenfield and *Gary M. Epstein*, on behalf of James B. Francis; *Isadore C. Alk, Julian P. Freret* and *Robert M. Booth, Jr.*, on behalf of Quality Broadcasting Corporation; and *Jay L. Witkin* and *Robert W. Ross*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 11, 1973; Released June 19, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. This proceeding, involving the mutually exclusive applications of James B. Francis (Francis) and Quality Broadcasting Corporation (Quality), for a construction permit for a new FM broadcast station to operate on 93.1 MHz, Channel No. 226, Las Vegas, Nevada, was designated for hearing by Order, 34 FR 2441, published February 20, 1969,[1] on various issues. Subsequently, the Review Board expanded the scope of the designated financial issue (17 FCC 2d 596, 16 RR 2d 55 (1969)). The issues as tried are as follows:

1. To determine the efforts made by James B. Francis to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

2. To determine the efforts made by Quality Broadcasting Corporation to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

3. To determine as to Quality Broadcasting Corporation:

(a) the basis of its estimated costs for the first year of operation;

(b) whether it has available to it the additional $53,813 and such other funds as may be required in the light of the evidence adduced under issue (a) above, to demonstrate its financial qualifications;

(c) in the event that it will depend upon operating revenues to meet costs and first year's operating expenses, the basis of its estimated revenues for the first year of operation, whether such estimate is reasonable and the extent to which net operating revenues may be relied upon to yield necessary funds for the initial construction and one year's operating costs;

[1] This proceeding originally involved the application of John R. and Jeannette B. Banoczi, as well, but the Administrative Law Judge, by Order, FCC 69M-421, released April 7, 1969, removed this application from hearing and returned it to the Commission's processing line.

(d) on the basis of the evidence adduced under the aforesaid issues, whether it is financially qualified.

4. To determine which of the proposals would better serve the public interest.

5. To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications for construction permit should be granted.

2. In an Initial Decision, FCC 72D–11, released February 16, 1972, Administrative Law Judge David I. Kraushaar concluded that the Quality application was to be preferred "under all the most significant" comparative criteria, and therefore recommended a grant of that application and denial of the Francis application. The Judge resolved all qualifying issues favorably to the applicants. The proceeding is now before the Review Board on exceptions filed by Francis and the Broadcast Bureau directed solely to the Judge's resolution of the financial issue. The Board has reviewed the Initial Decision in light of the exceptions and briefs, the arguments of the parties,[2] and its examination of the record. We are of the view that, for the most part, the Judge's findings and conclusions fairly and adequately reflect the record and, therefore, except as modified herein and in the rulings on exceptions in the attached Appendix, those findings and conclusions are adopted.[3] Since the only issue in dispute involves Quality's financial qualifications, our discussion herein will be limited to that subject.

3. Quality's estimates for costs of construction and first-year operation are as follows:

Initial payment on equipment lease	$856
13 monthly payments on equipment lease	5,558
Transmitter site lease (13 months)	2,600
Transmitter building, erected	1,000
Installation antenna and lines	750
Installation transmitter	400
Installation studio	200
Shipping	500
Utility deposits	100
Preoperational salary—Manager	500
Salaries (first year of operation):	
3 Announcers (full time) at $500/mo	18,000
Announcer (part time) at $100/mo	1,200
Station Manager (full time) at $750/mo	9,000
Salesman (full time) at $300/mo	3,600
Chief Engineer (contract) at $50/mo	600
News Service	4,000
Power	2,400
Telephone and broadcast lines	1,200
Postage	600
Stationery and supplies	500
Insurance	500

[2] Oral argument was held before a panel of the Review Board on May 10, 1973.

[3] We note, however, some disagreement with the manner in which the Initial Decision herein was prepared. In an inversion of the usual procedure, the Initial Decision turned to a comparative evaluation of the applicants before reaching the qualifying and contested financial issue. Although this approach does not result in reversible error, we believe it is inappropriate. For it has been a long and established Commission law that any applicant is not entitled to comparative consideration unless and until all outstanding prerequisite qualifying issues against it have been favorably resolved.

Licenses:	
FCC	120
ASCAP and BMI	1,000
SESAC	360
Travel—Local	500
Interest, 7% on $75,000 for 13 months	5,688
	[4] 61,732

[4] Quality's cost estimates have undergone several changes during the course of this proceeding. It originally estimated total costs at $56,313 and relied principally upon a stockholder loan of $60,000 to meet these costs. By amendment, filed September 15, 1971, and accepted without opposition (FCC 71M–1539, released September 23, 1971), Quality submitted a revised plan which contained new estimates for costs of construction and operation, a new source of funds (a $75,000 bank loan) to replace the previous source, and eliminated reliance on revenue, thus mooting subpart (c) of the financial issue. This plan was in turn modified by oral testimony at the hearing. The exceptions raised with respect to these changes will be treated, *infra*.

4. To meet these costs, Quality relies on a proposed bank loan, evidenced by a letter signed by Richard A. Carlson, Vice President, Nevada State Bank, providing (a) for a line-of-credit up to $75,000, to be secured by the personal guarantees of Patrick and Erin Clary (two of Quality's stockholders), and (b) for interest and other pertinent terms. Supplemental letters dated October 6 and 7, 1971, respectively, set forth repayment terms for interest and principal (providing, *inter alia*, that principal payments will not be due within the first 15 months). The letters also preserve the bank's right to require additional guarantees should the Clarys' financial condition deteriorate. Exceptors do not dispute the availability of the proposed bank loan. They do, however, challenge, the reasonableness of almost all of Quality's cost estimates. The major areas of controversy can, for discussion purposes, be categorized as follows: construction costs; salaries; telephone, power, postage, stationery and insurance; studio and office space; attorney's fees; preoperational advertising and promotion; and miscellaneous.

5. *Construction Costs.* Francis argues that by virtue of Quality's September 15, 1971 amendment which restructured its entire financial plan, all of its costs, both construction and operation, are in issue. Furthermore, both Francis and the Bureau argue that the Judge erred in allowing Quality to modify its equipment installation costs by oral testimony at the hearing without submitting a new letter from its equipment supplier. Quality's estimate for a transmitter building is also challenged on the grounds that it is not based on its particular needs and that the installation costs do not reflect reasonable salary levels in the Las Vegas market.

6. It is apparent that confusion arose at the hearing as a result of changes Quality made in its equipment plans at that time. Quality originally proposed to lease all of its equipment from CCA Electronics and submitted an equipment manufacturer's letter, dated September 10, 1971, signed by Bernard Wise, CCA's president, which provided for a $14,000 equipment credit. However, Quality increased this figure at the hearing to $18,600 to reflect a change in plans involving use of remote control equipment to link its transmitter to its studio instead of the lease of telephone lines as originally proposed. Despite Francis' position, however, construction costs are not in issue in this proceeding.

The designation Order placed in issue the availability of funds to Quality to meet its costs and the Board's subsequent Order enlarged the issues only to inquire into Quality's estimate for operating costs. Though Quality amended both its construction and operating costs on September 15, 1971, no opposition was filed at the time and the amendment was accepted by the Judge. His ruling was not appealed and no subsequent petition to expand the inquiry to encompass the basis of Quality's estimates for construction costs was filed.[5] In these circumstances, the exceptions raised with respect to Quality's estimate for construction costs go beyond the scope of the issue. See *Mace Broadcasting Co.*, 25 FCC 2d 621, 19 RR 2d 1135 (1970); *Clarkston Broadcasters*, 20 FCC 2d 40, 17 RR 2d 655 (1969).[6] Even if this were not the case, however, we would accept the oral modifications at hearing without a new letter from CCA. In brief, while a written modification of the letter would have been preferable, the Board perceives no valid reason, under the circumstances here, for rejecting the sworn, uncontradicted testimony of Patrick C. Clary, vice-president and 18.17% stockholder in Quality, as to the conversation with the President of the equipment supplier. Moreover, the changes made are accurately reflected in the "Initial Payment" and "13 Monthly Payments" in the record.

7. Costs for the proposed transmitter building and for installation are likewise beyond the scope of the issue added by the Board, but are in any case adequately substantiated. Thus, with respect to the building, Clary testified that the $1,000 cost was based on an oral estimate from Harry Bassett, president of Concord Holding Company, which was confirmed on October 12, 1971. The estimate was based on Clary's determination that the building needed would be approximately the size of a one-car garage. Thomas J. English, Quality's consulting engineer, testified that a building the size of a one-car garage to house the transmitter would be sufficient. He stated that such a building could cost between $1,000 and $2,000, depending upon amenities. The Judge accepted a $2,000 "outer limit"; and even utilizing this figure would not significantly reduce Quality's surplus of available funds over costs. The costs for installation of the transmitter and studio equipment were based on paying an installer at a rate of $5 an hour. English testified that the wage figures upon which these costs were based were reasonable although he could not say whether the labor was available in Las Vegas. While, again, it may have been preferable to predicate these estimates on actual knowledge of labor costs in the Las Vegas market, these figures are not unreasonable on their face and we emphasize that no contradictory figures were placed in evidence by the other parties.

[5] We cannot agree with the Bureau's refusal in its exceptions and supporting brief to acknowledge the updated construction cost figures presented at the hearing. Where an applicant's financial condition is in issue and that condition and/or proposal changes subsequent to designation, the resolution of its financial qualifications must be based on the most current information. *East St. Louis Broadcasting Co., Inc.*, 19 FCC 2d 289, 17 RR 2d 127 (1969); *Snake River Valley Television, Inc.*, 18 FCC 2d 70, 16 RR 2d 442 (1969).

[6] *Rochester Radio Co.*, 25 FCC 2d 216, 18 RR 2d 795 (1970), relied on by Francis in support of its assertion to the contrary is not, in our view, apposite. In that case, the Board expanded a financial issue predicated on applicant's amendment increasing its estimated costs. It did not approve an inquiry into aspects of financial qualifications not in issue or being placed in issue.

Under these circumstances, we are of the view that Quality has adequately substantiated its estimate in this regard.

8. *Salaries.* The exceptions directed to Quality's salary estimates fall into three areas: (a) the reasonableness of the figures themselves; (b) the reasonableness of a plan proposed by Quality for its stockholders to serve without pay; and (c) an alleged discrepancy in the number of employees Quality proposes. In the Board's view, none of these problems are substantial. With respect to (a), three of Quality's principals testified that these figures were based on current salary levels in the Las Vegas market. Of these, Joseph P. Delaney and William H. Bailey have broadcast experience in Las Vegas and their testimony was based on that experience. Bailey, in particular, was able to specify individuals he knew who were recently earning the salaries Quality estimated for salesmen and for announcers. And he himself had worked as a station manager at the figure estimated by Quality. He also pointed out that announcers commonly work at more than one station in order to increase their income and that he would have no objection to such an arrangement in the proposed station. The exceptors characterize this testimony as too limited, but in the Board's view, it is sufficient. The Board has relied in the past in resolving operating cost issues on the testimony of individuals with broadcast experience in the same or similar markets. See *Clarkston Broadcasters, supra.* The Bureau's exceptions also disregard the facts that salesmen will draw commissions and the station manager a bonus which would compensate for any lingering doubt as to the adequacy of the figures listed. The exceptions really amount to a challenge to Quality's inability to name individuals committed to it to work at those levels. In the Board's view, to expect this kind of specificity is itself unrealistic.[7] And, again, it must be emphasized that neither Francis nor the Bureau introduced evidence to contradict these figures. Compare *Chapman Radio and Television Co.*, 19 FCC 2d 157, 17 RR 2d 60 (1969).

9. With respect to (b), the Board notes that each of the Quality stockholders has submitted an affidavit specifying the service he will provide for the station. Three (Bailey, Delaney and John Marshall, Quality's president) have affirmed that they will serve without pay until a profit is realized, the fourth (Patrick Clary) will not demand payment for legal services until a profit is shown, and the fifth (Erin Clary) has not stated whether she will or will not serve without pay. However, the affidavit of Mr. Bailey indicates that all stockholders plan to serve without pay until profits are shown. It is also apparent from these sworn statements that all (except Erin Clary, who is Patrick Clary's wife), are presently employed and there is nothing in the record to indicate they would not or could not meet their part-time employment commitments to the applicant. The argument that they could not is sheer speculation and not based on record evidence. It is also noteworthy that each will work less than full-time at the proposed sta-

[7] The exceptors correctly point out, however, that the $50 figure for contract engineer has not been updated to the time of the hearing. However, even a doubling of the $50 figure would only add $600 a year and would not significantly reduce Quality's $13,000 surplus of available funds.

tion, presumably in order to allow for other employment.[8] Thus, in the Board's view, this plan is reasonable. *Cf. Clarkston Broadcasters, supra*, where an applicant's plan to employ a *full-time general manager* without salary for the first year was accepted.

10. The dispute with respect to (c) involves a discrepancy between Quality's September 15, 1971 amendment which calls for five full-time and three part-time employees and its hearing exhibit which lists five full-time and only two part-time employees. Quality did not explain this discrepancy at the hearing. We agree with the Presiding Judge that the discrepancy involving one part-time employee has no significance other than reflecting carelessness in Quality's preparation for hearing. In this connection we note that there is no contention by Francis or the Broadcast Bureau that Quality's proposal cannot be fully effectuated with one less part-time employee. We further note that Quality's stockholders are or will be devoting part of their time to the new operation.

11. *Telephone, power, postage, stationery, insurance.* Challenges are also raised to Quality's estimates for these items because the estimates were either made by Mr. Clary, who has no broadcast experience, or were supplied to him by Quality's communications counsel. The record shows that Clary testified to the telephone expense and based his estimate on costs of $100 a month, including long-distance calls, derived from his own experience in his law practice. This appears to the Board on its face to be a fair estimate; it is not rebutted by any other estimate in the record. The other costs were specifically based on the broadcast experience of counsel, who is vice president, director and one-third owner of Logansport Broadcasting Corporation, licensee of WSAL (AM–FM), Logansport, Indiana. Though counsel did not testify, Clary's testimony that these estimates *were* based on counsel's broadcast experience is unrebutted and, contrary to an assertion by the Bureau, Commission records reflect that Logansport Broadcasting Corporation is licensee of an FM station as well as a standard broadcast station. The Board has previously relied on testimony of not only those with broadcast experience in the same market, but also in the same service.[9] See *Clarkston Broadcasters, supra.* Moreover, the items involved are relatively small and even an arbitrary increase of 50%, or $2,000, would not significantly reduce Quality's $13,000 plus surplus. Furthermore, Quality unnecessarily includes in its expenses a total of $1,360 for music license fees. ASCAP and BMI license fees are listed as estimates based on anticipated revenues. Hence, this is an item which has been traditionally treated as revenue-related and which therefore should not have been listed. See *WPIX, Inc.* (*WPIX*), 22 FCC 2d 960, 18 RR 2d 1196 (1970). Thus, as much as a 34% increase in the challenged items $\frac{\$1,360}{\$4,000}$ could be offset against the unnecessary license fees in Quality's listing without reducing its cushion. In these circumstances, the Board accords little significance to these exceptions.

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[8] Messrs. Marshall and Clary have law practices and Mr. Delaney is a self-employed independent producer of programs; these occupations would allow all three flexibility to provide for a source of income apart from their obligations to the proposed station.

[9] While it is true that counsel did not testify, Francis did not object to Clary's testimony and did not request to cross-examine counsel.

12. *Studio and office space.* Francis argues that Quality's cost structure depends in part on the "extraordinary arrangement" of one of its stockholders, Robert Bailey, providing free use of office and studio space to the applicant at a shopping center he owns. Without evidence of the financial stability of Bailey or the shopping center. Francis asserts, no reliance can be placed on this plan. The record shows that Bailey, who is president and controlling stockholder in the company owning the Westend Shopping Center, has offered use of such space to Quality and is willing to agree to whatever terms would facilitate the success of the proposed station. In our view, a conclusion that Bailey would not fulfill his commitment to Quality in this respect would be inconsistent with the significant commitment he already has to it in terms of his stock ownership, role as an officer and director, and provision of services without charge until the applicant is profit-producing. In addition, the record indicates that, although no specific terms have been worked out, Bailey and the other Quality principals have discussed the arrangement principally in terms of a tradeout rather than as provisions of "free" office space. While it is true, as Francis points out, that Quality did not introduce evidence of Bailey's financial position, and that such evidence would have answered all questions in this regard, we do not believe that such evidence is an absolute necessity here where the studio and office will be located in a building already in existence, and therefore should not necessitate substantial additional expenditures. Francis' allegation to the contrary is completely unsupported and speculative. Compare *Western Communications, Inc.*, (*KORK–TV*), 30 FCC 2d 1077 (1973), and *Long Island Video, Inc.*, 12 FCC 2d 1016, 13 RR 2d 238 (1968). Finally, as with equipment and installation costs discussed earlier, construction costs in connection with this item would not come within the scope of the financial issue in this proceeding in any event.

13. *Attorney's fees.* Exceptors argue that these fees have not been included in Quality's costs. The record, however, shows that much of the prosecution expense has been advanced by Mr. Clary's law firm and payment will not be demanded until after profits are shown. With respect to communications counsel, some fees have been paid, and although there is no direct evidence of a deferral agreement, Quality relies heavily in its proposed findings and reply to exceptions on language in *Clarkston Broadcasters, supra*, in which the Board accepted such an arrangement, and, we believe that the totality of the record establishes that such a deferral agreement exists. Finally, and, in any case, we note that professional fees have traditionally been considered to be construction costs and, as such, are not in issue here. See *Home Service Broadcasting Corp.*, 21 FCC 2d 168, 18 RR 2d 63 (1970); *North American Broadcasting Co., Inc.*, 15 FCC 2d 984, 15 RR 2d 367 (1969).[10]

[10] Francis also charges that Quality has unjustifably arranged for deferrals in repayment of loan principal and auditing fees during the first year of operation. However, exceptors offer no reason for a conclusion that deferral of loan repayments is an attempt to circumvent *Ultravision* standards. (*Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965)). See *Rice Capital*, 17 FCC 2d 759 at note 16, and *Radio Nevada*, 15 FCC 2d 324, 330, 14 RR 2d 796, 805 (1968). Nor would we treat the deferral of auditing fees as significant either in the absence of something more than the allegation that such deferral is *per se* questionable.

14. *Preoperational advertising and promotion.* The exceptors also fault Quality for failing to provide for preoperational advertising and promotion. The crux of their argument in this regard is that such promotion is essential to the survival of a new FM station. We cannot accept this contention at face value without some evidentiary support for it. The evidence establishes only that Bailey believed promotional advertising was important and that although no specific arrangements were made, he had discussed with Delaney the possibility of handling this on the basis of trade-outs with newspapers or other stations. It is thus not established that any expense would definitely be incurred for promotion and, furthermore, even if it were, promotional expense has been tied in past cases to the revenue such advertising would produce and, as such, to be paid out of such income. *Brown Broadcasting Co., Inc.*, 14 FCC 2d 143 (1968); *Clarkston Broadcasters, supra.* Accordingly, since Quality is not relying on expected revenues, it did not have to list such expense.

15. *Miscellaneous.* Finally, exceptors argue that Quality has omitted such necessary items as furniture and fixtures, initial record libraries, cartridges, spots and jingles, taxes and entertainment, and that the cumulative effect of these items would be to overwhelm Quality's "cushion." We do not agree with this contention. First, there is no evidence whatsoever submitted by Francis to establish that entertainment of potential advertisers is essential to assure advertising revenues. Similarly, there is no evidence submitted by Francis to establish that "promo" spots and jingles are essential. Other items, such as taxes, office equipment, records and cartridges, are essential. However, it has never been Commission policy that every single conceivable item of expense must be itemized; the provision of an adequate surplus of available funds to cover the kinds of expenses unlisted here has been accepted in the past. In our view, and absent any evidence to the contrary, the cushion of over $13,000 provided by Quality is sufficient to cover the items in question here. See *Virginia Broadcasters*, 22 FCC 2d 227, 18 RR 2d 763 (1970); see also *Home Service Broadcasting Corp., supra.*[11]

16. As noted by the Presiding Judge, there are weaknesses in Quality's presentation and its showing, and the Board certainly would not utilize it as an example for other applicants to emulate in attempting to establish their financial qualifications. However, Quality has

[11] In his brief, Francis challenges the adequacy of Quality's cushion on the basis of *KSIG Broadcasting Co.* v. *FCC*, 445 F.2d 704, 21 RR 2d 2144 (1971). In our opinion, such reliance is misplaced. In that case, the court of appeals affirmed a Board decision (*Rice Capital Broadcasting Co., supra*), that an applicant for a standard broadcast station had reasonably estimated its costs of construction and operation. Therein, the Board engaged in a detailed, *de novo*, evaluation of the conflicting evidence under each item of cost. Francis submits that the expense items listed by the applicant in that case and approved by the court of appeals include many items not specified by Quality in its cost estimates. However, neither the Board nor the court indicated that the specific costs estimated by that applicant must be included by other applicants proposing different service to different communities. Moreover, in its reply to exceptions, Quality points out substantial difference between it and the applicant in that case which render the respective financial proposals non-analogous. Indeed, the limited nature of the financial issue in this case further renders our situation different from KSIG. Finally, of the items listed by Francis in paragraph 11 of his supporting brief as having been expressly provided for in *Rice Capital* and allegedly ignored by Quality, only taxes, office furniture and supplies and music record service were in fact not itemized by Quality. As shown in the discussion in the text, however, Quality's $13,000 plus surplus is available to meet these costs and such provision is reasonable and adequate.

satisfactorily established that its major cost estimates are realistic; and it has a sufficient surplus of available funds to conclude with a reasonable degree of certainty that it will be able to meet those costs for which funds have not been specially allocated and those where the bases of its estimates are questionable.[12] We wish to emphasize, as we noted at earlier stages of this Decision, that in no instance did either of the appealing parties support their challenges to specific cost estimates with direct evidence of their own contradicting such costs.[13] The figures put into the record by Quality were indeed the only figures placed in evidence and these were not unreasonable on their face. We thus resolve the financial issue favorably to Quality and conclude that the Judge's resolution of the case under the comparative issue should be affirmed. Under that issue, the Judge concluded that Quality was superior under "all the most significant criteria", which specifically included diversification of control of communications media, integration of management into ownership, past broadcast experience, participation in civic affairs and efficient use of the frequency. No exceptions have been addressed to these findings and conclusions and we believe them to be correct. A grant of the Quality application would serve the public interest, convenience and necessity.

17. Accordingly, IT IS ORDERED, That the application of Quality Broadcasting Corporation for a construction permit for a new FM broadcast station at Las Vegas, Nevada, IS GRANTED, and the application of James B. Francis for the same facility IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF JAMES B. FRANCIS

Exception No.[1]	*Ruling*
3	Denied for the reasons set forth in paragraph 6 of this Decision.
4	Denied. The Judge's findings fairly reflect the testimony of Bailey and Delaney as to staff requirements, based on their broadcast experience. See, *e.g.*, paragraph 8 of this Decision.
5, 15(a), 15(d)	Denied for the reasons stated in paragraph 11 of this Decision.
6	Denied. Quality did not rely on Clary's expertise as a broadcaster but supported each of its cost items independently. Only the estimate for telephone expense was based on Clary's experience and that was as a businessman. See paragraph 11 of this Decision.

[1] Francis has numbered his exceptions in accordance with the paragraphs of his pleading containing those exceptions. The less confusing and preferable manner is simply to number exceptions consecutively. See *Central Westmoreland Broadcasting Company*, 40 FCC 2d 21, 33 (1973). We also note that in Exception No. 2, Francis states that he has not submitted exceptions under the comparative issue because the Quality application should be "dismissed" for its failure to satisfy the financial issue. Although, as previously indicated (see note 3 of this Decision), an applicant which does not meet a disqualifying issue is not entitled to comparative consideration, we perceive no rationale (and Francis proffers none) under which such an application could be dismissed, rather than denied.

[12] As previously indicated, the availability of the $75,000 bank loan to Quality has not been questioned, and we believe Quality's showing in this respect complies fully with Commission requirements.

[13] Francis, who relied on the affidavit of Robert D. Hanna, an experienced broadcaster, in successfully urging the Board to order an inquiry into Quality's cost estimates, inexplicably failed to call Hanna to testify that Quality's cost estimates were unreasonable.

7	Denied. The initial payment figure does derive from the record. Clary and English testified to changes in Quality's equipment plans which would bring its total equipment credit to $18,600. At a cost of $23 per month per $1,000 with two monthly payments in advance, as originally called for by CCA, the initial payment amounts to $856 and 13 monthly payments to $5,564. See also paragraph 6 of this Decision.
8, 9, 15(b)	Denied for the reasons set forth in paragraph 7 of this Decision. Moreover, with respect to such items as utility deposits, shipping costs and preoperational salary, Francis' contentions are totally unsupported by any evidence challenging these estimates.
10	Granted insofar as the Judge's statement as to the sufficiency of Quality's "cushion" is somewhat confused and that Francis' statement as to the significance of the cushion is correct.
11	Granted. See note 2 to this Decision.
12, 15(c)	Denied for the reasons set forth in paragraph 8 of this Decision.
13, 15(e), 16(i)	Granted to the extent that Quality's estimate for a contract engineer was not updated (see note 6 to this Decision). Denied otherwise as not decisionally significant. See paragraph 10 of this Decision.
14(a)	Denied for the reasons stated in paragraph 12 of this Decision.
14(b)	Denied for the reasons stated in paragraph 9 of this Decision.
16(a)	Denied for the reasons set forth in paragraph 13 of this Decision.
16(b), 16(c), 16(d), 16(e), 16(f), 16(h), 19.	Denied for the reasons set forth in paragraphs 15 and 16 of this Decision.
16(g), 17	Denied for the reasons set forth in paragraph 14 of this Decision.
18	Denied for the reasons set forth in note 8 of this Decision.
21, 22, 23	Denied for the reasons stated in this Decision.

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU

1	Denied as being without decisional significance. See note 4 of this Decision.
2	Denied for the reasons set forth in note 5 of this Decision and Ruling on Francis' Exception No. 7.
3	Denied for the reasons set forth in paragraph 7 of this Decision.
4	Granted insofar as the Judge's comments regarding the operation of an FM station vis-a-vis a television station are irrelevant (see note 2 of this Decision); denied otherwise for the reasons set forth in paragraphs 15 and 16 of this Decision.
5	Granted to the extent indicated in note 7 of this Decision; denied otherwise for the reasons stated in paragraphs 8 and 10 of this Decision.
6	Granted in substance. See paragraph 14 of this Decision.
7, 8	Denied for the reasons set forth in paragraphs 13 and 15 of this Decision.
9	Granted.
10	Denied for the reasons set forth in paragraphs 6, 7, 10, 11, 13 and 15 of this Decision.
11	Denied for the reasons stated in paragraph 16 of this Decision.
12	Denied for the reasons set forth in this Decision.

F.C.C. 72D-11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JAMES B. FRANCIS	Docket No. 18437
LAS VEGAS, NEV.	File No. BPH-6435
QUALITY BROADCASTING CORP.	Docket No. 18438
LAS VEGAS, NEV.	File No. BPH-6522
For Construction Permits	

APPEARANCES

On behalf of James B. Francis, Messrs. *Gene A. Bechtel* and *Thomas Schattenfield* (Arent, Fox, Kintner, Plotkin & Kahn, Esqs.); on behalf of Quality Broadcasting Corporation, Messrs. *Isadore C. Alk, Julian P. Freret*, and *Robert M. Booth, Jr.* (Booth & Freret, Esqs.); and on behalf of the Broadcast Bureau, Federal Communications Commission, Mr. *Jay L. Witkin*.

INITIAL DECISION OF HEARING EXAMINER DAVID I. KRAUSHAAR

(Issued February 14, 1972; Released February 16, 1972)

PRELIMINARY STATEMENT

1. This proceeding has been pending for a long period of time.[1] Originally there were three applications, each requesting a construction permit to construct and operate a new FM broadcast station in Las Vegas, Nevada: John R. and Jeannette B. Banoczi, File No. BPH-6290; James B. Francis, File No. BPH-6435; and Quality Broadcasting Corporation, File No. BPH-6522. Because these applications were mutually exclusive the Commission, by Order released February 17, 1969 (FCC 69-101), consolidated them and designated them for hearing in the present proceeding, specifying the standard comparative issues, *Suburban* type issues[2], and a financial qualifications issue directed solely to Quality Broadcasting Corporation. The case was assigned to Hearing Examiner Thomas H. Donahue, since retired, as the Presiding Officer. The Banoczis petitioned to amend their application on March 21, 1969 in order to specify another frequency (Channel 231), and by Memorandum Opinion and Order released April 7, 1969 (FCC 69M-421), Examiner Donahue granted the

[1] The historical background of this proceeding is set forth in some detail so that those who may be interested may understand how it was that a Commission proceeding that had been set for hearing originally for the spring of the year 1969, has taken upwards of three (3) years to be heard. The Examiner believes that a less Draconian application of policies relating to proposed mergers of applicants would operate to shorten significantly the time required for the establishment of new or improved broadcast services for the benefit of the general public. See footnote 4, *infra*.

[2] See *Suburban Broadcasters*, 30 FCC 1020, 20 RR 951 (1961).

petition and ordered the removal of the Banoczi application from hearing and its return to the processing line.

2. The hearing herein was scheduled originally to convene May 12, 1969 (FCC 69M–200), but during a prehearing conference, on April 28, 1969, it was agreed, with the Examiner's approval, that it would be postponed until July 15, 1969. By Memorandum Opinion and Order released May 7, 1969 (FCC 69R–198), the Commission's Review Board, however, granted a petition by applicant Francis (filed March 7) for enlargement of the issues against applicant Quality Broadcasting Corporation to the extent of expanding the financial issue against the latter. (See *infra*, para. 8 and footnote 5.)

3. The applicants, meanwhile, entered into negotiations with a view to settling their differences by agreement, so that a new FM broadcast facility presumably could be made available to the public in the Las Vegas, Nevada area at an earlier date than would be feasible after extended litigation. Further prehearing conferences then ensued, notably on June 25, July 15, and August 20, 1969, while negotiations were continuing, and on October 28, 1969, the applicants filed a joint petition, pursuant to Rule 1.525, wherein they asked the Review Board for approval of a merger agreement. On November 17, 1969 a supplement to the joint petition was filed by the applicants. The hearing was repeatedly continued thereafter, *Viz.* Orders released November 21, 1969 (FCC 69M–1529) and February 25, 1970 (FCC 70M–269). By Memorandum Opinion and Order released March 24, 1970 (FCC 70R–116), 22 FCC 2d 279, the Review Board, Board Members Nelson and Pincock dissenting and issuing a statement, held that it could not conclude that this "'merger' arrangement is *bona fide*", and denied the joint petition.[3] However, the Board reconsidered by Order released April 23, 1970 (FCC 70R–153), to the extent that it then scheduled a conference of the parties pursuant to Rule 0.365, as suggested in the dissenting statement of Messrs. Nelson and Pincock and stayed the effectiveness of its Memorandum Opinion and Order, FCC 70R–116, released March 24, 1970, until further notice.[4] An informal (off-the-record) conference was then held as scheduled before the Board, which thereafter (by Order released May 4, 1970, FCC 70R–162) directed the parties to file statements and responses regarding matters discussed during the informal conference. The Hearing Examiner thereupon postponed the hearing once again, until July 1, 1970, by Order released May 5, 1970 (FCC 70M–650). And, because the Review Board had not acted by then, Examiner Donahue, on the unopposed motion of the applicants, again continued the hearing, this

[3] The striking point in the Review Board's ruling, as to which Board Members Nelson and Pincock dissented, appears to have been a proposal to issue shares of preferred stock in a new corporation to Quality. It seemed, however, if the applicants were to be believed, that the proposed preferred stock would only have given Quality a preference as to corporate assets on liquidation and that the stock would have no real value for the foreseeable future. See also footnote 1, *supra*.

[4] By Report and Order, *In the Matter of Amendment of Parts 0 and 1 Rules and Regulations*, released November 6, 1970 (FCC 70–1193), 26 FCC 2d, 331, the Commission (para. 3) recognized that hearing proceedings might be "expedited" by authorizing the presiding officers to act on requests by applicants for the approval of agreements between them that would remove the conflict between their applications, pursuant to Rule 1.525. It amended the pertinent rules, including Rule 0.365, so as to delegate such authority to the hearing examiners. The amended rules went into effect on November 13, 1970, too late to be applicable to this proceeding. See also footnote 1, *supra*.

time until October 12, 1970, by Memorandum Opinion and Order released June 15, 1970 (FCC 70M–846). Finally, by Memorandum Opinion and Order released June 22, 1970 (FCC 70R–219, 24 FCC 2d, p. 178, 181), the Review Board reinstated its previous Order (the same Board Members again dissenting) and once again denied the joint petition.

4. The next development in this protracted case was the retirement of Examiner Donahue. As a consequence, by Order released July 29, 1970 (FCC 70M–1054), the present Hearing Examiner was appointed to preside. About a month afterward, however, he suffered a heart attack and the Chief Hearing Examiner, by Order released September 11, 1970 (FCC 70M–1249) then cancelled the hearing date of October 12, 1970, subject to further order of the Presiding Examiner. The applicants, meanwhile, had applied to the full Commission for review of the Review Board's action in refusing to approve their "merger" agreement. Without opinion, the Commission, by Order released November 9, 1970 (FCC 70–1192), denied the application for review

5. By letter dated November 16, 1970, the applicants, "Pursuant to a conference held this morning between counsel for applicants and counsel for the Broadcast Bureau, and in accord with the Commission's established policy regarding hearings containing community survey issues", requested the Examiner to take no further action in the case until the Commission resolved the practices and procedures regarding such issues. The Commission resolved the matter by issuing its *Primer on Ascertainment of Community Problems by Broadcast Applicants* on February 23, 1971, 27 FCC 2d 650. Parties to proceedings like the present proceeding were afforded a ninety day period of time to amend their applications to conform to the new *Primer* (in this proceeding, until May 24, 1971). The Examiner convened a further prehearing conference, however, on April 16, 1971, during which it was agreed, with the Examiner's approval, that the hearing would begin on October 12, 1971 (T.67–72; Order After Prehearing Conference released April 20, 1971, FCC 71M–594).

6. Subsequently, by Order released June 7, 1971 (FCC 71M–894), the Examiner granted unopposed petitions by both applicants, filed May 24, 1971 (the deadline date for such amendments), for leave to amend their applications in order to comply with the new *Primer*. A further amendment to Quality's application, in order to revise the applicant's financial plan to meet the financial issue against it, was accepted by an Order released September 23, 1971 (FCC 71M–1539), and an amendment to clarify an aspect of Quality's programming proposals was accepted by Order released October 15, 1971 (FCC 71M–1653). Hearing sessions were held on October 12 and 13, as last scheduled. And, on October 13, 1971, the record was closed.

7. By Memorandum Opinion and Order released November 17, 1971 (FCC 71M–1795), the Hearing Examiner reopened the record to consider a petition by Quality Broadcasting Corporation for an extension of time until December 13 for the filing of proposed findings of fact and conclusions of law and until December 20th for the filing

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of reply briefs. The rationale for the request had been prior commitments of counsel and the late delivery of the hearing transcripts by the Official Reporter which interfered with counsel's vacation plans. After noting that the Official Reporter had indeed been remiss in effecting the timely delivery of the record transcripts, the Examiner, taking account of his own hearing schedule, extended the deadline for filing proposed findings to January 14, 1972 and replies until January 24, dismissed Quality's petition as moot, and once again closed the record. Thereafter, the Examiner, at the behest of Quality, further extended the time to file reply briefs until January 27th.

8. The issues on which this case had finally been heard are set forth as follows:[5]

> "1. [deleted as applicable to the dismissed application of John R. and Jeannette B. Banoczi, *supra.*]
>
> "2. To determine the efforts made by James B. Francis to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.
>
> "3. To determine the efforts made by Quality Broadcasting Corporation to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.
>
> "4. To determine as to Quality Broadcasting Corporation:
>
> (a) the basis of its estimated costs for the first year of operation;
> (b) whether it has available to it the additional $53,813 and such other funds as may be required in the light of the evidence adduced under issue (a), above, to demonstrate its financial qualifications.
> (c) in the event that it will depend upon operating revenues to meet costs and first year's operating expenses, the basis of its estimated revenues for the first year of operation, whether such estimate is reasonable and the extent to which net operating revenues may be relied upon to yield necessary funds for the initial construction and one year's operating costs;
> (d) on the basis of the evidence adduced under the aforesaid issues, whether it is financially qualified.
>
> "5. To determine which of the proposals would better serve the public interest.
>
> "6. To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications for construction permit should be granted."

FINDINGS OF FACT

Comparative Coverage

9. As noted above, this proceeding involves the mutually exclusive applications of James B. Francis and Quality Broadcasting Corporation, each requesting a construction permit for a new Class C FM broadcast station to operate on Channel 226 (93.1 MHz) at Las Vegas, Nevada. Francis proposes to operate with an effective radiated power of 29.69 kilowatts and antenna height above average terrain of 25

[5] Issue 4 was modified as cited in the text by the Review Board in its Memorandum Opinion and Order released May 7, 1969 (FCC 69R-198). See para. 2, *supra.*

feet; and Quality proposes to use an effective radiated power of 41.5 kilowatts and antenna height of 1,190 feet above average terrain.

10. Las Vegas is located in the southeastern corner of the state. It is the largest city in Nevada, the county seat of Clark County, and the principal community of the Las Vegas Urbanized and Standard Metropolitan Statistical Area (SMSA). Las Vegas has a population of 125,787.[6] Clark county, which comprises the Las Vegas SMSA, has 273,288 persons, and the Urbanized Area has 236,681. The following broadcast facilities are authorized in Las Vegas:

FM: KVEG–FM, 92.3 MHz, 27 Kw, 180 ft., C
KRGN (FM), 101.9 MHz, 20 Kw, 41 ft., C
KORK–FM, 97.1 MHz, 44 Kw, 195 ft., C
KLUC–FM, 98.5 MHz, 5.78 Kw, 93 ft., C

AM: KLUC, 1140 kHz, 10 Kw, D, II
KORK, 920 kHz, 500 W, 5 Kw–LS, DA–2, U, III
KENO, 1460 kHz, 1 Kw, 5 Kw–LS, DA–N, U, III
KVEG, 970 kHz, 500 W, D, III
KLAV, 1230 kHz, 250 W, 1 Kw–LS, U, IV
KRAM, 1340 kHz, 250 W, 1 Kw–LS, U, IV

TV: KORK–TV, Ch. 3, 100 Kw, 270 ft.
KLAS–TV, Ch. 8, 200 Kw, 241 ft.
KLVX, Ch. 10, 295 Kw, 1,220 ft., Educ.
KSHO–TV, Ch. 13, 204 Kw, 290 ft.

11. The predicted 1.0 mv/m contours of the stations proposed by Francis and Quality described irregularly shaped areas that respectively extend 14 to 24 and 37 to 60 miles from the center of Las Vegas. Quality's proposed 1.0 mv/m contour completely encompasses the area within the proposed 1.0 mv/m contour of Francis. The composition of the coverage areas is reflected in the following table:

	Population	Area (sq. mi.)
Francis 1.0 mv/m contour	261,391	1,103
Quality 1.0 mv/m contour	271,412	6,521
Differential area served by Quality only	10,021	5,418

12. The proposed 1.0 mv/m contour of Quality encompasses all of the urban community of Boulder City, Nevada (pop. 5,223) and the proposed 1.0 mv/m contour of Francis includes approximately 90% of the area of that city. Thus, assuming equal distribution of population, the differential area served by Quality includes some 10% of Boulder City or 522 persons.

13. Considering FM services only, Station KILA provides 1.0 mv/m service to all of the differential area and KLVM (FM), KVEG–FM, KRGN (FM) and KORK–FM serve less than 25% so that a minimum of one and a maximum of four FM services are available therein as follows:

[6] All population data herein are based on 1970 U.S. Census population counts used in conjunction with 1960 Minor Civil Division maps inasmuch as 1970 maps were not available.

Number of existing FM services	Population	Area (sq. mi.)
1	7,426	4,593
2	441	453
3	183	218
4	*1,971	154
	10,021	5,418

*Includes 522 persons in Boulder City.

14. Considering AM services in conjunction with the above FM services, AM Stations KLUC, KORK and KENO provide daytime primary service (0.5 mv/m or greater) to all of the rural differential area and KVEG and KLAV serve 75–99% thereof. Thus, from four to more than five aural services are available to various portions daytimes. The urban part of the differential area (10% of Boulder City) receives daytime primary service (2.0 mv/m or greater) from AM Station KLUC. Accordingly, at least five aural services are available thereto daytime. At night, AM Station KENO provides primary service to a small portion of the rural differential area but to none of the urban sector. Accordingly, from one to five aural services are available to the differential area at night. The sparsely served areas are as follows:

Number of existing nighttime aural services	Population	Area (sq. mi.)
1	7,380	4,555
2	483	486
3	177	209

Other Comparative Factors

15. Applicant Francis is a Dallas, Texas lawyer who resides in Dallas and who devotes full time to diverse investments which include the Presidency, a directorship and a 51% ownership interest in Sovereign Broadcast, Inc., oil and gas properties and real estate. Sovereign is the sole stockholder of Carla Broadcasting, Inc., the licensee of standard broadcast Station KVIL, Highland Park, Texas and Station KVIL–FM, Highland Park-Dallas, Texas, and of Nevada Broadcast, Inc., the licensee of standard broadcast Station KRAM, Las Vegas, Nevada. Sovereign is also a 25% stockholder of Kelly Broadcasting Company, the licensee of Station KPTL, Carson City, Nevada, and it possesses a contractual right to acquire a 25% stock interest in the permittee of an FM broadcast station (KRWL–FM) in Carson City, Nevada. The evidence indicates that Mr. Francis devotes at least half his time to the broadcast operations of Sovereign.[7]

16. In contrast, Quality is a newly formed Nevada corporation composed of the following officers and stockholders, all of whom are also

[7] Four commercial FM broadcast stations, 6 standard broadcast stations, and 3 commercial TV stations are presently licensed to Las Vegas. In addition, 2 commercial FM, 2 standard broadcast and 1 commercial TV station are licensed to nearby Henderson, Nevada, some 12 miles southeast of Las Vegas (pop. 16,395). Two daily newspapers are published in Las Vegas, one weekly is published in North Las Vegas, one weekly in Henderson, and one weekly in Boulder City.

directors and none of whom has ever had any media ownership, or ownership or other related interest in the licensee of a broadcast station:

	Percent
James John Marshall—President	36.76
Erin M. Clary—Secretary-Treasurer	18.05
William H. Bailey—Vice President	13.51
Joseph P. Delaney—Vice President	13.51
Patrick C. Clary—Vice President	18.17
	100.00

17. Mr. Marshall, *supra*, a native of Kansas, moved to Las Vegas, Nevada in 1967, was admitted to the Nevada Bar the following year, and is engaged in law practice in Las Vegas. Mr. Delaney, *supra*, a native Pennsylvanian, a member of the Louisiana Bar, moved permanently to Las Vegas, Nevada in 1962, where he has been continuously engaged in broadcasting as a self-employed independent producer and conductor of radio and television programs. Mr. Bailey, *supra*, a native of Detroit, Michigan, has, seemingly, considerable background as a producer of radio and television programs, and is a long-time Las Vegas, Nevada resident who, at the time of the hearing in this proceeding, was devoting full time to the operation of his own real estate business, the operation of a shopping center owned by his realty company, and to the ownership of a cocktail lounge and package store. Mr. Clary, *supra*, is a native of Las Vegas and has lived there continuously except for the period 1945–53. Mrs. Clary (Erin M. Clary, *supra*), is a native of Reno. It thus appears that all of the principals of Quality are presently local residents of Las Vegas, Nevada.

18. The evidence shows that Mr. Francis participates in all significant policy decisions of Sovereign and that he is in daily, close contact with Mr. Robert D. Hanna, whose office is located immediately adjacent to his and who is a veteran broadcaster who is serving as the executive head of the broadcast operation of Sovereign. Mr. Francis receives a daily manager's report, has traveled to Las Vegas on a number of occasions in order to observe the operations of Station KRAM, *supra*, and Station KRAM's management come to Highland Park, Texas two or three times annually for conferences with Mr. Francis. Mr. Francis proposes to maintain a similar relationship with the management and operation of his proposed Las Vegas FM station.

19. The evidence shows, furthermore, that Mr. Hanna, Mr. Francis' associate, is a 49% stockholder, vice president and a director of Sovereign, *supra*; that Mr. Francis has an "unwritten understanding" with Mr. Hanna under which the latter may acquire a 25% interest in Mr. Francis' proposed Las Vegas FM station "in consideration of his services"; that Mr. Hanna proposes to take advantage of the "understanding" and to take up a 25% interest in the proposed FM station; and that it is proposed that Mr. Hanna will serve as "the executive head" of the broadcast operation of the proposed FM station, reporting to Mr. Francis. Mr. Hanna is a resident of Dallas, Texas and presently devotes full time to his duties as executive head of Sovereign's broadcast operation, reporting to Mr. Francis, Sovereign's President and 51% stockholder. He presently travels to Las Vegas every month

or two to inspect the operation of AM Station KRAM and he is the recipient of daily "manager reports" and is in daily contact with KRAM station personnel by written or telephone communications. There is no indication that Mr. Hanna is to become a Las Vegas resident in the event Mr. Francis' application herein is granted or that he will devote any specific amount of time to the daily operation of such proposed station.

20. In contrast to absentee ownership and the form of operation proposed by Mr. Francis, the evidence demonstrates the following with respect to Quality's proposed operation: Mr. Marshall is to serve as General Manager, as well as corporate President, on a part-time basis estimated at an average of 3 hours daily and 15 hours weekly, as the supervisor of overall station operations, and to do so without compensation until the operation becomes profitable; Mr. Delaney, who is self-employed, is to devote an average of 4 hours daily, 6 days a week, to so-called "public service and community programming" and would conduct daily open-line telephone interview programs and work with civic leaders and organizations, and also to do this without salary until the station operated profitably; Mr. Bailey, who is also to serve without pay until the operation becomes profitable, is to devote at least 4 hours daily as Program Director; Mr. Clary is not to participate in daily station operations but will serve as General Counsel of the corporation; and finally, Mrs. Clary is to devote approximately 4 hours daily and 20 hours weekly to station operations, as bookkeeper and in "traffic management".

21. The evidence also shows that, with the exception of Mr. Marshall (36.76% owner) and Mrs. Clary (18.05% owner), Quality's principals have engaged in a wide and diversified range of civic and community activities in Las Vegas, Nevada and environs. In this regard, it is especially noted that Mr. Bailey is a leader of the Black Community in Las Vegas, that he is a member of the Board of Directors of the Las Vegas Branch of the NAACP, and that he has received an award for service from that organization each year for the past 17 years. Mr. Marshall is also a member of the Board of Directors of the Uptown Kiwanis Club and a 33rd Degree Mason. In order not to encumber this Initial Decision with too many details, paragraphs 7–11 of Quality's proposed findings of fact are hereby adopted and incorporated by reference herein with regard to the community and civic participation of that applicant's principals.

22. The evidence does not indicate that Mr. Francis or his associate, Mr. Hanna, have been involved at all in Las Vegas civic and communal activities. Nor does it show that they have engaged in such endeavors in Highland Park or Dallas, Texas.

23. With regard to broadcast experience, the evidence shows that Mr. Francis, by virtue of his majority interest in Sovereign Broadcast, Inc., has had whatever benefits may accrue from ownership experience in broadcast facilities. Mr. Hanna, his associate, besides enjoying broadcast ownership experience, too, has a background in the broadcasting field which goes back to the year 1948. Indeed, he has been

employed in the past in the capacities of radio announcer, sports director in broadcast stations, time salesman, sales manager, and as assistant general manager of a radio station. He has been with Sovereign since the year 1968.

24. While Quality, in contrast, cannot match Mr. Francis' ownership experience in broadcast facilities, the evidence does show that its Mr. Delaney has had considerable broadcast experience producing, directing and appearing, during the past 6 years, in regard to a variety of programs, including a daily TV program on Station KSHO–TV over a 4-year period; and that its Mr. Bailey appears to have had extensive experience both as a performer and producer of radio and TV programs. See Quality's Proposed Findings, para. 8 and 9, which (see above) have been adopted and incorporated by reference herein.

Ascertainment of Community Needs (Issues 2 and 3)

25. Both applicants have made satisfactory showings of overall compliance with the requirements of Commission policy as to the ascertainment of community "needs", interests and problems of the areas to be served. See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). Neither has laid claim in the instant proceeding to superiority over the other in terms of such things as the extent to which each has satisfied Commission policy expectations in this area, of the methods used by each to ascertain community problems, or of the kinds of surveys each has conducted. Indeed, the issues do not call for such comparisons and none of the parties has ever sought expansion of the issues in this respect. Nor has either applicant attacked the showing made by the other under these special issues. Accordingly, it would seem to be a futile chore for the Examiner to undertake to describe *de novo* herein the details each applicant has set out in its proposed findings in regard to Issues 2 and 3. Rather than to encumber this Initial Decision with such a plethora of seemingly useless details, none of which has been contested,[8] the Examiner hereby declares that he adopts paragraphs 21–34, inclusive, of Mr. Francis' Proposed Findings of Fact and paragraph 15 of Quality's and that he deems these paragraphs to have been incorporated verbatim herein by reference.

Quality's Financial Qualifications

26. The issue, *supra*, relating to Quality's financial qualifications is somewhat limited in scope. It inquires (a) into the basis for the applicant's *own* estimated cost for the first year of operation; (b) whether Quality has available to it such funds as may be required to satisfy its *own* estimates; and (c) in the event that it relies on

[8] The Commission's Broadcast Bureau, the only other party to this proceeding, simply included the following laconic remark as to Issues 2 and 3 in its proposed findings (below para. 10), without even undertaking later to respond or to reply to the findings proposed by the applicants thereon: "The Bureau does not propose any findings with respect to these issues". Thus, this might indeed be one of those rare instances where the Bureau did not supply at least some comment on showings made by applicants pursuant to potential disqualifying issues because it considered both applicants to have made a satisfactory showing.

operating revenue to meet costs and first year operating expenses, the basis and reasonableness of its revenue estimates. Quality elected, however, to reject (c), *supra*, and to rely instead upon a showing that it contends demonstrates it will have sufficient funds to construct its proposed FM broadcast station and to operate it a full year on the assumption that there will be no revenues at all during that entire period.

27. As finally revised, Quality has shown that, in order to satisfy all of its own estimated financial commitments, it has a letter dated September 10, 1971 (on which it relies) from Richard A. Carlson, vice president of the Nevada State Bank extending a line of credit to it in the amount of $75,000.00. This letter shows that the proposed loan to Quality shall be secured by the personal guarantees of Mr. and Mrs. Patrick Clary; shall extend for a period of three years; and shall bear interest at 1% above the prime bank rate prevailing at the time of the loan. Interest is to be payable annually on the anniversary date of the loan. A supplemental bank letter dated October 6, 1971 shows that repayment of the proposed loan is to be as follows: interest only payments to be made quarterly, for a period not to exceed 15 months, following which the loan is to be paid off in 36 equal monthly installments, principal and interest included. From a further supplemental bank letter, dated October 7, 1971, it appears the bank is satisfied with the personal guarantees of the Clarys, and that only in the event there are significant adverse changes in their financial condition would any additional guarantees be required. Needless to state, Mr. and Mrs. Patrick Clary have explicitly agreed to provide their personal guarantees to the proposed bank loan.

28. As indicated above, the estimated operating cost for the first year of operation of Quality's proposed FM broadcast station is now predicated on the unrealistic [9] assumption that no revenue at all will be received during that entire year. Other assumptions Quality made as a basis for this estimate (Quality's proposed findings, para. 13) include: staff requirements predicated on the broadcasting experience of two stockholders, namely Messrs. Bailey and Delaney; and the knowledge and experience of the same two individuals with respect to salary scales and working conditions in the Las Vegas broadcast industry, and general knowledge of business costs in Las Vegas. It was also assumed that approximately one month would be required for actual construction of the proposed FM broadcast station. On the basis of all assumptions, Quality has submitted a finally corrected estimate (Quality's Reply to Proposed Findings, etc., Appendix A) that it will have cash expenditures aggregating $61,732.00 during the

[9] The fact that Commission policy requires all broadcast applicants to show that they have enough funds available to operate the facility the entire first year without revenues, or to demonstrate the validity of revenue estimates, does not make a supposition that there will be no revenues at all a realistic supposition. See *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965).

period of construction and first year of operation of its proposed FM broadcast station, broken down as follows:

Initial payment on equipment lease	$856
13 monthly payments on equipment lease	5,558
Transmitter site lease (13 months)	2,600
Transmitter building, erected	1,000
Installation antenna and lines	750
Installation transmitter	400
Installation studio	200
Shipping	500
Utility deposits	100
Preoperational salary—Manager	500
Salaries (first year of operation):	
3 Announcers (full-time) at $500/mo	18,000
Announcer (part-time) at $100/mo	1,200
Station Manager (full-time) at $750/mo	9,000
Salesman (full-time) at $300/mo	3,600
Chief Engineer (contract) at $50/mo	600
News Service	4,000
Power	2,400
Telephone and broadcast lines	1,200
Postage	600
Stationery and supplies	500
Insurance	500
Licenses:	
FCC	120
ASCAP and BMI	1,000
SESAC	360
Travel—Local	500
Interest, 7% on $75,000 for 13 months	5,688
	61,732

29. The other parties have disputed the veracity of the foregoing estimate at a number of points which thus need to be considered herein. First, the Bureau's proposed finding that indicates that the applicant, under its latest revised proposal, has estimated its total construction costs and cost of operation at $72,580.00 (Bureau's Proposed Findings, para. 12) appears to be predicated on data that were modified during the course of the hearing by other evidence. Second, it appears from the record that the initial payment to be made to CCA Electronics Corporation for equipment, predicated on a letter from that firm to Quality dated September 10, 1971, will be $856 (rounded out) and not $644.00 as the Bureau has indicated in para. 12 of its proposed findings, and that payments thereafter to the equipment supplier will be $428 (rounded out), which aggregates $5,564 over 13 months and not the $4,186 figure indicated by the Bureau. Furthermore, again with respect to the equipment proposal, it appears, from the unrebutted evidence, that CCA's total proposal includes installation of the tower by CCA. Third (as to the Bureau's proposed findings, para. 14), the evidence indicates that while Mr. Clary "did not have exact dimensions" for a small building to house the applicant's proposed remotely controlled transmitter installation, as to which the estimated construction cost is $1,000.00, there is expert opinion in the record to the effect that a building only about the size of a one-car garage will suffice to

house the proposed transmitter and associated equipment. Whereas there does appear, at one juncture of the record, to be a conflict in the testimony as to whether the $1,000.00 allocated for the purpose would suffice to cover the entire construction cost of such a building (T. 258, 260), there is additional evidence (in the form of an opinion by the applicant's consulting radio engineer) that the cost of such a building would be between $1,000.00 and $2,000.00 depending on the "amenities", including air conditioning, that might be installed with it. Under the circumstances, it would not appear to be unreasonable, for the purposes of the issues, to assume that the $2,000.00 figure is a realistic outer limit for such a building, when one considers the engineer's testimony in conjunction with Clary's representation that he had had an oral quote of $1,000.00 from one Harry Basset, president of the Concord Holding Co.

30. The evidence also warrants findings to the effect that estimated "preoperational expenses" will include $400.00 for installation of equipment at the transmitter; $200.00 for installation of equipment at the studio; $100.00 in utility deposits; $500.00 in preoperational salary for two weeks to the station manager; and $500.00 to cover the cost of shipping equipment to Las Vegas; or $1,700.00 in all. These items are all included in the applicant's own total estimate (*supra*, para. 28) of $61,732.00, and the Broadcast Bureau evidently concurs (Bureau's proposed findings, para. 15). It appears, however (from the further cross-examination conducted of Mr. Clary, T.206–208, especially), that the $7,220.00 item labelled "Taxes and Miscellaneous" at the foot of the Bureau's itemized list of anticipated expenses in paragraph 16 of the Bureau's proposed findings was never intended by the applicant as anything more than a catch-all which was arrived at specifically for bringing the total estimated first year's operating expenses to an even $55,000.00. Actually, "Taxes" in the labelled item, according to Mr. Clary, was meant to refer to Federal income taxes which would not be assessable anyway if the station had no income during the first year, although, to be "realistic", he certainly believed the station could expect to have some income then (T. 207). The purpose, then, of the $7,220.00 item was to show that the applicant's estimates did allow for a "cushion" (T.208). Under the circumstances, the itemized list which includes installation expenses, pre-operational expenses, and first year's operating expenses and which do not include the $7,220.00 item, para. 28, *supra*, as such, is perhaps a better, more specific, reflection of what the applicant *actually* expected its financial situation to be. The "cushion" it would have would ordinarily be the difference between the total in para. 28, *supra*, $61,732.00, and the $75,000.00 proposed bank credit. Viewed in this light and considering all other relevant factors, including the fact that an FM broadcast facility is not nearly as complicated either to construct or to operate as a television station would be, the "cushion" thus provided, of $13,268.00, may suffice to persuade the triers of the facts that Quality is indeed financially qualified, provided that other factors injected into the record do not create a significant doubt as to the sufficiency of this sum of money.

31. The Bureau, in paragraph 17 of its Proposed Findings and in subsequent paragraphs, points up what it evidently considers to be

weaknesses in Quality's financial estimates. Weaknesses do exist, but again, it is fair to stress that an FM facility is not a television station. Furthermore, not all of the Bureau's criticisms are fairly justified. For example, it appears that Quality proposes to employ a salesman at a salary of $300.00 monthly ($3,600.00 annually, see list, para. 28, *supra*) *in addition to commissions on sales*, a factor which the Bureau does not mention in its paragraph 17. The applicant's financial showing, however, was predicated on the Commission's policy assumption of no operating revenues during the first year, hence no sales commissions to be paid during the crucial period. Thus, it may not be as unrealistic as the Bureau implies to accept the salary estimates based on the apparently limited broadcast, but general business, experience of Messrs. Bailey and Delaney.[10] Moreover, it would also appear to be unfair to Quality to stress, as the Bureau has done, that "no formal agreement" has been entered into with the so-called "contract" engineer who is to be paid $50 a month to take care of the transmitter and perform the necessary transmitter checks if a specified transmitter site is utilized, when the evidence shows that the $50 figure is predicated on a discussion with the engineer who is presently the chief engineer of a TV station which uses the same site. Too, the citation by the Bureau of a "discrepancy" between Quality's September 11, 1971 amendment and an exhibit it presented in evidence with respect to one part-time employee seems to be a meaningless triviality, because there was no evidence to show that other employees cannot reasonably be utilized to perform the services that would be performed by the omitted employee, who seemingly could have been merely a salesman.

32. The Bureau, in para. 18 of its proposed findings, correctly summarizes a portion of Mr. Clary's testimony regarding the discovery that telephone lines do not exist on Black Mountain wherein the applicant's proposed transmitter site is located, the prohibitive cost (over $100,000.00) of installing transmission lines between that site and the studios, and the applicant's alternative proposal to establish a remote control system. But the Bureau provides no indication, at least in the same paragraph of its proposed findings, of its evaluation of this evidence, except that it stresses that Mr. Clary "could provide no written evidence from CCA" of a change in its "agreement" that would eliminate the Rust RC–1000 Remote Control that appears on the equipment list of CCA and that Mr. Clary states would no longer be required. The fact is, however, according to a further summary of testimony by the Bureau at its paragraph 21, that the applicant's consulting engineer, Thomas English, was presented as an expert witness, testified (without contradiction by other evidence) that the technical revisions required would cost $5,657.00 *in toto*, and that $750.00 additional would suffice to cover the cost of installing antenna and transmission lines. (Presumably some kind of a credit for the unused Rust RC–1000 Remote Control from CCA, costing $995.00, may be expected

[10] Bailey held the positions of station manager and sales manager at standard broadcast station KVOV, Las Vegas, for 4 weeks during May or June of 1971, and Delaney had producing and directing experience in connection with radio and TV programs on Las Vegas broadcast stations.

to be available against the $5,657.00 item; but there was no specific evidence on that point.)

33. Again, at paragraph 19 of its proposed findings, the Bureau summarizes certain of the evidence in a way that seems to give emphasis to the vagueness of some of Quality's planning. For example, it is noted that while Quality has represented in its exhibits that its studio and office space will be obtained at no cost through a "trade" arrangement with a shopping center and that Mr. Bailey, one of the principals of the applicant, has offered it "possible" use of 2,400 square feet of studio space on property in the West End Shopping Center in Las Vegas, of which he is President, the principals had not "really" discussed the "definite" terms thereof. In this instance, the Bureau failed to point out that Mr. Bailey is not only the West End Shopping Center President but that he is its controlling stockholder; that there are 100,000 square feet in this shopping center and approximately 31 stores; that there are three or four places in the shopping center that are presently vacant that would be available to Quality; and that Mr. Bailey "offered" space to Quality in the West End Shopping Center which he controls (T.185–188). As has been noted previously (para. 16, *supra*), Mr. Bailey is a Vice President, director and 13.51% stockholder in Quality. As an important party to its application, the Commission can look to Mr. Bailey, as well as to Quality itself, for compliance with the representations both have made during the hearing. Thus, the absence of "definite terms" as between Mr. Bailey and Quality and its other principals on the use of the shopping center space would appear to be of little significance in the real world of business, wherein important transactions are often undertaken in an atmosphere of mutual trust. Similarly, whereas the proposed arrangement could have been discussed for the first time *after* Quality's last amendment to its application, and this may have a bearing on the extent and detail of the applicant's advanced planning, it would appear to have little bearing on the matter of its financial qualifications, so long as the Commission can rely on Mr. Bailey's explicit representation that the studio space will be available to it free of charge and that he will provide for construction and remodeling at his own expense (para. 19, Bureau's Proposed Findings).[11]

34. One of the matters which seems to have caused concern to Quality's adversaries is the question whether Quality has included anything in its estimate of first year operating expense for "preoperational advertising." Another cause of concern is the question whether provision has been made for payment of the balance of fees to Quality's Washington Communications Counsel and whether arrangements have been made to payment for future work to be done by engineering

[11] The Examiner believes the Commission is especially entitled to rely on the following testimony given by Mr. Bailey (T.190):

". . . I think, to be very frank about this . . . I am a member of the application for this license, and this is extremely important to me. Whatever is necessary, if it is in my means to do it, I am going to do, if that is going to be the condition to make the station successful. That is just the plain truth.

"Presiding Examiner: Even to the extent of making studio space available free of charge, and in addition, providing at your own cost and expense . . . for construction and remodeling?

"The Witness: Yes, sir."

consultants. There is evidence that there has been some discussion among principals of Quality to the effect that there is a "possibility" that pre-operational promotion can be handled by "trade-outs". In any event, there is no evidentiary basis for magnifying this item beyond reasonable proportions. It is not very reasonable, to say the least, to expect businessmen, who will be motivated to operate a successful enterprise, to squander their capital investment in pre-operational promotions. Too, while provision had not yet been made at the time of the hearing for payment of fees presumably due to Washington communications counsel, or for future engineering work, a factor which may be characterized as a deficiency in the applicant's advance planning, there is not a scintilla of evidence in the record to indicate that these items are likely to be significant in respect to the applicant's financial capability, or that communications counsel and consulting engineers in any event are unlikely to wait a reasonable period before demanding payment. *Cf. Clarkston Broadcasters*, 20 FCC 2d 40, 45 (1969).

35. Considering everything that has already been said (para. 28–34, *supra*), it does not appear that if all allegedly unplanned-for cost items brought out during the course of the hearing were added together, the applicant's total cost estimate at para. 28, *supra*, would be affected significantly, or, to put the matter somewhat differently, that the estimated "cushion" of $13,000.00, in round figures, would be diminished materially.

CONCLUSIONS

36. In comparing competing applicants and their proposals the Examiner is required to apply the principles set out in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). Therein (1 FCC 2d at 394) the Commission held that there are "two primary objectives toward which the process of comparison should be directed . . . first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications". The Commission went on, in the *Policy Statement*, to attempt a delineation of the factors it deemed significant under the two primary areas of comparisons. In the light of these long-established Commission guidelines it is abundantly clear, from the evidence of record in this case, that the Examiner must conclude that Quality is superior under all the most significant criteria; provided, of course, that the financial qualifications matter is first settled in its favor.

37. It requires no extended dissertation, indeed, to point up the facts here, that Quality's stockholders are *all* local residents of Las Vegas, Nevada; that at least two of Quality's stockholders have engaged in a wide and diversified range of civic and community activities *in Las Vegas;* that, in particular, Mr. Bailey, a director and Vice President and significant stockholder, is a leader of the Las Vegas Black Community; that at least Mr. Marshall, Quality's President and largest stockholder, and its Mr. Bailey, are to be integrated into the daily operations of Quality's proposed FM broadcast station in a meaning-

ful way, as General Manager and Program Director, respectively, of the proposed station; and that neither Quality nor any of its stockholders owns *any* media interests. The contrast with Mr. Francis, who resides in Texas and who clearly does not intend to move to Las Vegas in the event his application is to be approved, and who already has broadcast interests, including a standard broadcast station in Las Vegas itself, is thus stark.[12] Too, while Mr. Francis may point to broadcasting ownership "experience" as a consideration in his favor that Quality and its owners do not possess, even this minor factor of comparison (1 FCC 2d at 396) is outweighed to a considerable degree by the broadcast programming experience of Messrs. Delaney and Bailey. And the record is barren of evidence showing a superior record of performance by any of Mr. Francis' broadcast stations (1 FCC 2d at 398). Finally, even in terms of "Efficient Use of Frequency" (1 FCC 2d at 398), Quality's proposal is significantly superior to Mr. Francis'; for, as the Broadcast Bureau stated in paragraph 8 of the section of its Proposed Findings entitled "Conclusions of Law," *inter alia*, "Quality would serve all those proposed to be served by Francis plus 10,021 persons in 5,418 square miles in a surrounding differential area which is entirely rural except for 10% of the population of Boulder City, Nevada (pop. 5,223), or 522 persons". Within the so-called "differential area", the Bureau indicates, Quality would meet an ostensible public "need" for FM service by providing "a second FM service to 7,426 persons in 4,593 square miles", day and night, and indeed, "a second aural service [AM or FM] to 7,380 persons in 4,555 square miles" *at night*. The Examiner, for convenience, hereby adopts paragraph 8 of the Bureau's "Conclusions of Law" in its entirety and deems it to have been incorporated by reference herein *verbatim*.

38. In the light of the Examiner's conclusions, *supra*, on the comparative aspects of this proceeding, it may appear, to the casual observer, at least, to be a strange and somewhat anomalous result of this lengthy litigation if the Examiner were to take the step requested by Mr. Francis, and recommended by the Broadcast Bureau, of disqualifying Quality as lacking in financial capacity, thereby depriving a significant portion of the listening public of an opportunity to receive a presumptively needful nighttime aural broadcast service, as well as the opportunity to be served by an applicant that has been found, after a protracted Commission hearing, to be significantly superior to its competitor under all of the most relevant Commission criteria. In the last analysis, however, the Commission, under statutory directive, must reasonably satisfy itself, before it makes the requisite ultimate public interest finding, that even such an applicant as Quality will be financially able to carry out the commitments it has made to the Commission. Indeed, the comparative hearing process, ideally, ought not to be regarded as a charade for the benefit of lawyers and bureaucracy, but rather as a very real and genuine effort to

[12] While it may be concluded that the overall weight to be given to the comparative factor of diversification of media of mass communications is diminished by the existence of so many competing facilities in the Las Vegas area, Quality is still entitled to at least a moderate preference in this comparative case for the undeniable fact of its larger contribution to the diversification of voices to be heard in the area, considering the fact that Mr. Francis has an interest in an AM station there.

produce, for the exclusive benefit of listening and viewing publics, the best possible service from the best and most reliable licensees available.

39. In reviewing the evidence and the above findings, however, the Examiner is persuaded that the views of those who are opposing Quality on the matter of its financial qualifications are unjustifiably harsh or Draconian, considering the nature of the facility involved in this proceeding (*i.e.*, an FM broadcast station, not a television station) and the realities of business life, on the basis of which the likelihood of realizing some revenue, at least, during Quality's first operational year cannot be entirely eschewed. Anyway, as the Examiner views the established facts of record, Quality has a "cushion" of about $13,000.00, *in terms of calculable costs*, looking at the situation about as adversely as possible to the applicant's position, within which to operate during the entire first year of operation, assuming no revenue whatsoever. Putting the matter as succinctly as possible, in the Examiner's opinion it would appear to be unnecessary, for the purposes and in the context of this proceeding at least, to dwell unduly upon elements of Quality's estimates that only seem at first blush to be vague or unsubstantiated, because none of these questionable terms looms large or significant in the operation of an FM broadcast station, or were shown by convincing evidence to be so significant. In this connection, it would appear that while Quality, with the burden of proof devolving upon it, does assume the legal risk of non-persuasion before the triers of the facts, the opposing parties are yet not completely lacking in responsibility as to the matter. For they run similar risks when, on cross-examination, or by rebuttal, they point to alleged omissions from, or weaknesses in, the applicant's financial estimates without presenting convincing, or persuasive proof to demonstrate the significance thereof. Indeed, it is one thing to bring forth facts that, unexplained, operate persuasively to destroy one's adversary; it is something else again to raise "straw men" or "red herrings" that can only leave the fact finder with an insubstantial feeling of "non-persuasion".[13] In the present instance, the Examiner is simply not persuaded that the quantum of proof adduced by Mr. Francis and the Broadcast Bureau suffices to raise serious doubts regarding the alleged inadequacy of such items as Quality's salary estimates and of its proof regarding the need for, and cost of, new remote equipment, and of the claimed failure to provide for possible pre-operational promotion expenses. Indeed, in the Examiner's judgment, the engineering testimony, which was unimpeached, may be relied on as establishing a reasonable basis for the estimated cost of new remote equipment: there is no basis for believing that pre-operational promotion could be significant; the salary estimates were not shown to be unreasonable *per se;* and the cost of constructing the garage type structure to house the applicant's transmitter, though not predicated upon detailed architectural drawings, was corroborated to some extent and does not appear to be inherently

[13] The "burden", in lawyers' parlance, is not to convince or persuade "beyond a reasonable doubt" as in criminal trials, but only by a "preponderance of evidence". As the initial fact finder herein, the Examiner has endeavored to combine his own knowledge of business with his observance of the witnesses during the hearing in the process of weighing the record evidence. He is reasonably satisfied that the evidence in favor of Quality's proposals preponderates over the factors that have been raised against them.

unreasonable. On balance, while it is indubitably true (Bureau's "Conclusions of Law", para. 6), that "this applicant [or its lawyer] has long been aware of the Commission's concern as to the adequacy of its proposed operating costs" and, therefore, that it could have endeavored more adequately to provide in advance for the elimination of all vague financial estimates, it is equally true that the applicant had a right to traverse the more difficult path (*i.e.*, for the fact finders) that it has in fact traversed in this case, thereby risking its failure to persuade those who must be persuaded that its proposals are in the public interest.

40. The Examiner having already found both applicants to be qualified under the so-called "Suburban Issues", and having reached the conclusions above that Quality has at least minimally (all that is required) established its financial capability, it remains for him to agree with paragraph 7 of the Bureau's "Conclusions of Law" that should he "conclude that Quality is financially qualified, and that both applicants have satisfied their burdens under the qualifying issues in this proceeding, ultimate resolution of this proceeding must be determined under the comparative issue". On overall balance, therefore, considering all the findings and conclusions above and the entire record in this proceeding, it is concluded ultimately that Quality Broadcasting Corporation has shown that grant of its application will better serve the public interest, convenience and necessity than grant of the application of James B. Francis would.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Rule 1.276, the application of Quality Broadcasting Corporation for a construction permit to build a new Class C FM broadcast station which is to operate on Channel 226 (93.1 MHz) at Las Vegas, Nevada, is hereby GRANTED, and the application of James B. Francis for the same facility IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DAVID I. KRAUSHAAR, *Hearing Examiner.*

F.C.C. 73-529

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
GTE SYLVANIA, INC.
For Waiver of All Channel TV Receiver Rules (Sections 15.65, 15.68 and 15.69 (a) (3) of the Commission's Rules)

MAY 16, 1973.

GTE SYLVANIA INC.,
1120 Connecticut Avenue NW.,
Washington, D.C. 20036

Attention: Mr. William Malone, Resident Attorney

GENTLEMEN: This is in reply to your letter of January 17, 1973, requesting the Commission to amend the waiver granted on October 10, 1972. In the instant request, GTE Sylvania seeks permission to eliminate the UHF tuner from its hospital/nursing home receivers, and to manufacture and market such receivers with a VHF-only tuning capability.

You point out that the UHF tuner in your special receiver is a useless appendage, since down-conversion of UHF signals to VHF channels eliminates the need for a UHF tuner. Moreover, you make it clear that the combination of your VHF-only receiver with a hospital/nursing home MATV system equipped with a UHF down-converter provides a composite installation which will give the user access to all UHF as well as VHF TV channels available in a given area. Reiterating the fact that your hospital TV receiver is so designed as to minimize the possibility that it can be used apart from the hospital/nursing home custom installed in-wall wiring, you maintain that no all-channel TV interest appears to be served by including a UHF tuner in your receiver, and conclude that omission of this tuner would result in economies beneficial to the hospital/nursing home user without, in fact, sacrificing any UHF reception capability.

It appears that grant of your request would not adversely affect the audience potential of present or future UHF stations in a given area, and that such grant would be consistent with the Commission's policy underlying its all-channel TV receiver rules. At the same time, it appears that the resultant economies of manufacturing a VHF-only receiver would accrue to benefit of hospitals and nursing homes.

In view of the foregoing, GTE Sylvania, Incorporated is hereby granted a waiver of the Commission's all-channel TV receiver rules (47 CFR 15.65–15.68, and 15.69(a)(3)) to permit the shipment and sale of VHF-only TV receivers manufactured for the precise purposes expressed in the Sylvania letter of January 17, 1973.

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This model receiver should be certificated in the normal manner. The application for certification should identify the receiver as a special purpose model, should include a copy of this letter, and should contain a statement that the receiver will be used only for the precise purpose and in the precise manner expressed in the Sylvania letter of January 17, 1973. It should also include a statement that the following information will be submitted to the Commission's Office of Chief Engineer in writing prior to each installation or sale:

1. The name and address of the hospital or nursing home where the receivers are to be installed and of any person to whom such receivers are sold for installation in a hospital or nursing home.
2. The model number of the receiver.
3. A statement that the receiver will be connected to a master antenna system and that all UHF TV signals in the area will be carried on the system.
4. A statement that the manufacturer has taken steps by way of contract to adequately assure that the receivers will not be used apart from the master antenna system or in any way transferred to others for such use.

Commissioner Wiley concurring.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-595

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Identification of
SOURCE OF, OR PARTY SUPPLYING, CERTAIN
BROADCAST MATTER

JUNE 1, 1973.

The Commission by Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Reid, Wiley and Hooks issued the following PUBLIC NOTICE:

IDENTIFICATION OF SOURCE OF, OR PARTY SUPPLYING, CERTAIN BROADCAST MATTER

It has long been the practice of some government departments, agencies, legislators and other parties, including private businesses and trade associations, to furnish pre-recorded material to broadcast stations, either by means of long-distance telephone or by supplying audio or video tape or film. Such actions by the parties furnishing such recorded material constitute no violation of the Communications Act.

However, allegations recently have been made that in broadcasting such material, some broadcast licensees have misled the public by identifying the source of the material as their own news correspondents and that some licensees have failed to comply with the requirements of the following Rules: Section 73.119(d) for AM stations, Section 73.289 (d) for commercial FM stations, Section 73.503(d) for noncommercial educational FM stations, Section 73.654(d) for TV stations, and Section 73.621(e) for noncommercial educational TV stations. (See Appendix for text of the Rules.)

The Commission views with concern any deliberate and substantial misrepresentation to the public by a licensee, such as falsely claiming that a broadcast originates from its news correspondent, and we consider such practices as raising questions as to the qualifications of a licensee.

Further, in connection with recorded program material furnished to a licensee which involves discussion of political or controversial public issues and which is furnished as an inducement to the broadcast of such material, the Commission calls the attention of licensees to the above-cited provisions of its Rules requiring that an announcement be made that such material has been so furnished to the station.

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APPENDIX

The text of the identical Rules to which reference is made in paragraph 2 of the Public Notice relating to commercial AM, FM and TV stations follows:

> (d) In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts, or other material or services have been furnished to such station in connection with the broadcasting of such program: Provided, however, That only one such announcement need be made in the case of any such program of 5 minutes' duration or less, either at the beginning or conclusion of the program.

The cited Rules for non-commercial educational FM and TV stations in paragraph 2 of the Public Notice provide that such noncommercial stations are subject to the provisions of the referenced Rules for commercial FM and TV stations "to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others. . . ."

F.C.C. 73-577

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of LAKE TELEPHONE CO. For Certification, Under Section 214 of the Communications Act, of Cable Facilities Constructed at the Memorial Point Community in Polk County, Texas and for Waiver of Sections 63.54 and 64.601 of the Commission's Rules In the Matter of PETITION BY EASTEX TELEPHONE COOPERATIVE, INC., TO STAY CONSTRUCTION AND/OR OPERATION OF A CABLE TELEVISION SYSTEM BY LAKE TELEPHONE CO. IN THE MEMORIAL POINT COMMUNITY, POLK COUNTY, TEX.	File No. W-602-16/P-C-8405

MEMORANDUM OPINION AND ORDER

(Adopted May 31, 1973; Released June 13, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT.

1. The Commission has before it the above-captioned application filed by Lake Telephone Company (Lake) on May 25, 1972, an opposition filed by Eastex Telephone Cooperative, Inc. (Eastex) on September 29, 1972 [1] and Lake's reply filed November 2, 1972. Lake has requested certification, if deemed necessary pursuant to Section 214(a) of the Communications Act, of cable facilities which it has constructed and proposes to construct in unincorporated residential developments in Polk County, Texas. These developments are located on the shores of Lake Livingston within Lake's telephone service area, approximately 3 miles southwest of Blanchard, Texas and 27 miles east of Huntsville, Texas. The facilities for which certification is requested consist of 26,000 feet of coaxial cable constructed between June 1971 and January 1972 at a cost of $20,000 as well as proposed construction of 10 miles of coaxial cable in expectation of serving 200 homes in two years. As of December 1971 service had commenced to 11 homes. Lake will own and operate its cable television system.[2] Lake has requested

[1] Eastex opposition was not filed within the time allowed in our rules for response to Section 214(a) application and request for waiver. However, in view of information coming to light subsequent to this filing, this controversy would be more expeditiously resolved by allowing the pleading and we will not dismiss it as untimey filed.

[2] An application for a certificate of compliance to operate a cable television system in this location filed by Lake pursuant to Section 76.11 of the Commission's Rules (File No. CAC 869, Code TX 261) is pending.

waiver of Sections 63.54 and 64.601 of the Commission's rules to permit it to complete construction and operate this cable television system within its telephone service area, but has not requested waiver to cover operations beyond March 16, 1974.

2. Lake and Eastex are both connecting carriers within the meaning of Section 2(b)(2) of the Communications Act and provide interstate message toll service pursuant to toll agreement with Southwestern Bell Telephone Company. The State of Texas does not regulate telephone operations and no local franchise is required in unincorporated areas such as the Memorial Point Community. Eastex is an independent cooperative telephone company whose operating area has been determined by agreement with other independent telephone companies in the area and with the Rural Electrification Administration. The Memorial Point Community is wholly within what Eastex considers to be its operating area. Lake is a telephone company formed to serve the Memorial Point Community and apparently serves no other areas.

3. Eastex does not object to Lake's provision of cable television service *per se*, but only because the offering of cable television service facilitates the provision by Lake of telephone service in what Eastex considers its "long established" and "adequately served" telephone service area. Moreover Eastex apparently does not intend to get into the cable television business itself. Its primary concern here appears to be the loss of potential telephone service to Lake, which is, by means of the cable television offering for which certification is requested, better able to develop telephone service in the area. Lake contends that its cable television and telephone facilities are separate and that it is providing better telephone service than Eastex.[3]

4. The Commission also has before it a Reply and Request for Cease and Desist Order filed by Eastex on December 11, 1972, an opposition filed by Lake on January 17, 1973 and a reply filed by Eastex on February 9, 1973. Eastex alleges that Lake has continued to construct cable facilities during the pendency of its application for Section 214(a) authorization. In opposition Lake admits that it has continued construction but asserts that this construction need not be certified under Section 214(a), for reasons to be discussed below.

5. The Commission has also received numerous letters and a petition from residents of the Lake Livingston area, all requesting that we authorize extension of Lake's cable television system as soon as possible.

6. In considering Lake's application, we have before us two separate issues. The first concerns the scope of our Section 214 jurisdiction and the second the application of our rules prohibiting telephone company affiliation with cable television operators in their telephone operating area. First we consider the Section 214 issue. In its application, Lake asserts that it did not seek Section 214 certification prior to commencing construction because it understood that such certification

[3] Our consideration of Lake's application for Section 214 certification is limited to determining the need for the construction of interstate lines of communication for cable television service and does not involve consideration of the public need for intrastate lines of communication constructed or to be constructed by Lake, over which the Commission has no jurisdiction. See Section 2(b) of the Communications Act.

was not required for distribution facilities providing channel service to a cable television system serving fewer than 50 customers. In its opposition of January 17, 1973, Lake admits that it continued construction after filing for a Section 214(a) certificate but asserts that it was still serving less than 50 customers so that certification for this construction was unnecessary. It relies for these assertions on a Commission opinion letter of March 3, 1971 concerning the construction of a master antenna distribution service (MATV) by D&E Cable.T.C., Inc. within the operating area of its parent telephone company.[4] In that letter we dealt with the construction of MATV facilities not connected in any way to D&E's cable system, and we held that we had not asserted Section 214 jurisdiction over such MATV facilities. But we also pointed out that:

> However, as you know, we have held that construction of cable facilities for transmission of broadcast television signals by a carrier constitutes construction of part of an interstate channel of communication requiring prior Commission certification under Section 214 of the Communications Act when a main communication line and not merely a minor improvement of existing services is involved.[5] Such certification would be necessary irrespective of how the distribution channel service was utilized by the carrier's customer. *General Telephone Company of California et al.*, 13 FCC 2d 448, 13 RR 2d 667 (1968); *aff'd.* 413 F. 2d 390, 16 RR 2d 2001 (1969); *cert. den.* 396 U.S. 888 (1969). See also *Section 214 Applicability to Broadcast Channel Service*, 22 FCC 2d 526 (1970).[6]

The D&E Cable TV letter itself, and the decisions cited therein, put Lake on notice that the facilities it was constructing were subject to our Section 214 jurisdiction. We hold that Section 214 certification is necessary for the construction, operation or acquisition of lines for the purpose of providing channel service to operations providing customers with broadcast signals whether or not the operations were within the definition of a cable television system in Part 76 of the rules.

7. This brings us to consideration of the application of our rules prohibiting telephone companies from operating, or being affiliated with the operators of cable television service in their operating areas.[7] As we have declined to assert cable television regulatory jurisdiction over facilities serving fewer than 50 subscribers or those in apartment buildings under common ownership or control,[8] we need not be concerned with telephone company operation or control of such facilities. This does not mean, however, that a telephone company may wait until 50 subscribers are actually receiving service before applying for a waiver of our affiliation rules. Section 63.54 requires that a telephone company make a showing in its application for Section 214 certification that it is unaffiliated with its proposed cable television customer if the facilities it proposes to construct will provide channel distribu-

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[4] D&E Cable TV, Inc., 28 FCC 2d 24 (1971).

[5] In the *General Telephone* decision we found that cable television system distribution facilities by their nature involve "main" communication lines as they provide "new customers with a type of service significantly different from that theretofore provided". (13 FCC 2d at 459)

[6] 28 FCC 2d at 24. In the latter decision cited the Commission held that Section 214 certification was necessary for the construction of lines to provide channel service to broadcast stations, whether or not such lines exceed ten miles in length and whether or not the carrier is deemed a "connecting carrier" for other purposes.

[7] Sections 63.54 and 64.601. Docket 18509, *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities to Affiliated Community Antenna Television Systems*, 21 FCC 2d 307, *reconsideration denied*, 22 FCC 2d 746 (1970).

[8] Section 76.5(a) of our rules.

tion facilities to a cable television *system*. Of course, at the time of application there are no subscribers and hence no system. If, however, the facilities proposed are likely to become a system or to serve a system then both Sections 63.54 and 64.601 will apply.

8. Had Lake filed for a Section 214 certification prior to construction, as required, we could have made a determination at such time of whether or not its facilities had the potential to become a cable television system. It appears that Lake's facilities had the potential to become a system right from the beginning, its expressed initial "intention" that no more than 49 subscribers would be receiving service notwithstanding. There is no doubt now of course that we have under consideration a true cable television system and so the affiliation rules clearly apply. We will reach the merits of Lake's request for waiver of these rules only if we first find that we would be justified in granting its application for Section 214 certification.

9. We find that the construction and operation by Lake of cable television channel distribution facilities without first securing the required certification constituted a violation of Section 214 of the Act and Sections 63.54 and 64.601 of the rules; and that Lake's operation of such unlawfully constructed facilities is in continuing violation of the Act and of the Commission's rules. Under such circumstances we would have legal grounds for directing Lake to show cause why a cease and desist order should not be directed against it prohibiting any further construction and operation of cable television channel distribution facilities. *Ashtabula Cable TV, Inc., et al.*, 17 FCC 2d 113 (1969); *reconsideration denied*, 18 FCC 2d 193 (1969). In that case, involving unlawful construction of cable television facilities by a small telephone company, we said we would act on the application for Section 214 certification only upon a substantial showing of unusually meritorious circumstances that the public interest would be served thereby.[9]

10. Such circumstances are not present in this case and Lake's reliance on our D&E Cable TV, Inc. letter is not an acceptable excuse for not securing Section 214 certification prior to construction. In view of the unlawful conduct involved, an unconditional grant of its application for certification would not be justified. However as there appears to be no cable television operator now seeking to serve the public at Memorial Point and as some residents are receiving service and others have been promised service, it would not be in the public interest to withdraw Lake's service to the public without insuring that an alternative means of providing cable television service to the area is available. Under such circumstances, we will permit Lake to continue operating its existing system and to construct and operate additions to this system as proposed, provided that it divest itself of all interest in the furnishing of cable television service to the viewing public, within the meaning of Sections 63.54 and 64.601 of our rules, prior to March 16, 1974. We shall require Lake to submit on June 18, 1973, and quarterly thereafter, reports on the progress of efforts towards such divestment.

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[9] See also *Fort Mill Telephone Company*, 25 FCC 2d 748 (1970), 31 FCC 2d 867 (1971).

11. Accordingly, IT IS ORDERED, that the application of Lake Telephone Company, FCC File No. W-602-16/P-C-8405, and request for waiver contained therein IS DENIED except as hereinafter provided.

12. IT IS FURTHER ORDERED, that the reply and request for cease and desist order of Eastex Telephone Cooperative, Inc., IS DENIED.

13. IT IS FURTHER ORDERED, that Lake Telephone Company IS GRANTED temporary authority to continue operation of its existing facilities and to construct and operate additions to such facilities as are proposed in its application, PROVIDED that Lake Telephone Company divest itself of all interest in the operation of cable television service to the viewing public, under the meaning of Sections 63.54 and 64.601 of our rules, prior to March 16, 1974, and PROVIDED that Lake submit reports on June 18, 1973, and quarterly thereafter, detailing progress concerning its efforts to comply with this divestment.

14. IT IS FURTHER ORDERED, that this authorization is issued without prejudice to any Commission action which may hereafter be indicated as a result of the consolidated proceeding in Docket Nos. 16928, 16943, and 17098, as well as to any other Commission action affecting CATV operations that may result from any rulemaking instituted by the Commission.

15. IT IS FURTHER ORDERED, that this authorization shall not be construed to relieve Lake Telephone Company, or its successors or assignees, from compliance with the requirements of Part 76 of the Commission's rules, or any Commission order that may be issued pursuant to Part 76 of the rules.

16. IT IS FURTHER ORDERED, that this authorization is granted subject to the condition that Lake Telephone Company shall make pole or conduit space, if any, available to any other cable television system, in its telephone operating area, upon proper request, with the limitations of technical feasibility, at reasonable charges and without undue restrictions as to use.

17. IT IS FURTHER ORDERED, that the Secretary of the Commission shall send a copy of this Memorandum Opinion and Order to Lake Telephone Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
STATION WGCB, RED LION, PA. AND WXUR,
MEDIA, PA.
For advisory ruling re personal attack
rules

JUNE 8, 1973.

BENEDICT P. COTTONE, Esq.,
1730 M Street NW., Suite 908,
Washington, D.C. 20036

DEAR MR. COTTONE: This is in reference to your request of May 4, 1972 for an advisory ruling as to whether the "Life Line" program broadcast January 27, 1972 and moderated by Mr. Melvin Munn, contained a personal attack, within the meaning of Section 73.123 of the Commission's Rules, against the United Church of Christ. We regret that we are just now able to respond to your letter, but the staff was for many months swamped with complaints and inquiries related to the 1972 primaries, conventions and general elections, which would have become moot unless they were resolved at once. Therefore, it was necessary to postpone consideration of your request, which was filed over three months after the broadcast in question.

In your letter of May 4 you enclosed a copy of the "Life Line" program entitled "Radicals Say: No More Prisons" broadcast on January 27, 1972 on Stations WGCB, Red Lion, Pennsylvania and WXUR, Media, Pennsylvania. You ask the Commission to answer the following questions:

(1) Whether the "Life Line" broadcast of January 27, 1972 is within any of the exempt categories specified in the Personal Attack rules and if not—
(2) Whether such broadcast contained any "personal attack upon the honesty, character or integrity or like personal quality" of the United Church of Christ during discussion of a controversial issue of public importance and if so—(a) what was the controversial issue of public importance under discussion in said broadcast, (b) what was the specific language constituting such personal attack, (c) what was the particular "personal quality" ("honesty", "integrity", "character" or the "other personal quality") which was attacked—
(3) If it is the ruling that the Personal Attack rules are applicable—(a) Are the licensees required to give to the United Church of Christ reply time equivalent to the full length of the entire "Life Line" broadcast on only the amount of time in such broadcast which was devoted to the personal attack, and (b) May the licensee reasonably introduce the reply broadcast in the manner stated in the enclosed memorandum?

Further, you noted that it is the judgment of the licensees requesting a ruling on this matter that the "Life Line" program was not a discussion of a controversial issue of public importance; nor did it contain

a personal attack within the meaning of Section 73.123 against the United Church of Christ.

In commenting on your May 4 letter to the Commission, Earle K. Moore, Esq. Counsel for the United Church of Christ, stated in a letter dated May 18, 1972 that "Life Line" program "taken as a whole, alleges a conspiracy to release imprisoned criminals by legal and illegal means including violent assaults on prison guards and/or police. It is made plain that the United Church of Christ is a working Member of this conspiracy." Mr. Moore also states:

> An accusation of criminal conduct is clearly an attack on integrity and character. Furthermore, a charge of fomenting violence, as ascribed to the United Church of Christ or any other organization which has publicly advocated non-violent solutions to social evils, amounts to an attack on honesty and integrity.

Mr. Moore stated that the United Church of Christ has no objection to its reply being introduced with the statement that Mr. Munn criticized the position of the United Church of Christ on prison administration, but would object to an introduction which includes a renewal of the attack broadcast on January 27, 1972.

On October 31, 1972 the United Church of Christ sent a letter to the Commission advising it that other stations which broadcast the January 27 "Life Line" program refused to broadcast its reply. The United Church of Christ also noted it did not learn of the alleged attack until the spring of 1972.

As you know, the personal attack rule is contained within Section 73.123 of the Commission's Rules and Regulations. The rule states that when, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, it is the duty of the licensee within one week after the broadcast of the attack, to notify the person or group attacked, and to send a script, tape or as accurate a summary as possible and an offer of a reasonable opportunity to respond.

The January 27 "Life Line" program discussed alleged efforts by the "Liberal-New Left" to increase prison tensions in the wake of the Attica Riot and the winding down of the fighting in Southeast Asia. The program alleged that the Attica Riot was the beginning of a campaign by the New Left to demand release of all prisoners by 1976: that New Left leaders held a September 1971 Washington meeting "to discuss a paper by Arthur Waskow that deals with a plan to create unrest in the prisons"; that the Waskow plan calls for mass demonstration; that Waskow's Institute For Policy Studies is organizing students "to close jails and prisons"; that the Washington meeting "called for subsequent meetings"; that one of the participants of later meetings was the United Church of Christ; and that the "United Church of Christ has financially supported groups characterized as 'violent and/or subversive' and 'anti-white and militant.' "

Thus, it appears that the January 27 "Life Line" program examined the problems in our nation's prisons, including the causes of prison unrest and that it would have been unreasonable to conclude that a discussion of a controversial issue of public importance did not take

place. Further, the program alleged that the United Church of Christ is a part of a conspiracy to cause prison unrest through illegal and violent means and is financing "violent and/or subversive", anti-white, militant groups. We believe that this is an attack on the honesty, character, and integrity of the United Church of Christ. Since the "Life Line" program does not fall within any of the exemptions of Section 73.123, the licensees had an obligation to comply with its requirements within seven days from the date of the attack.

In regard to your question whether the licensees are required to give the United Church of Christ reply time equivalent to the full length of the entire "Life Line" program, Section 73.123 specifies that a reasonable opportunity must be provided the group or individual attacked. The determination as to what constitutes a reasonable opportunity is initially to be worked out by the licensee and the party to whom the time is afforded. If the group or individual attacked is not satisfied with the opportunity provided by the station, a complaint may be submitted to the Commission. The Commission would then decide, based on all the facts, whether the licensee was reasonable in its determination as to what constitutes a reasonable opportunity.

You also ask whether the licensee can introduce the United Church of Christ's reply with commentary which would "present 'Life Line's' justification for statements made in the January 27, 1972 broadcast." Prefacing or concluding a reply to a personal attack with a repeat of or justification for the original attack, would not appear, on its face, to constitute a reasonable opportunity to reply.

As indicated above, your request for an advisory ruling did not arrive at the Commission until more than three months had elapsed since the date of the alleged personal attack. Although we invite licensees to contact the Commission if in doubt as to whether a program contains a person attack, this inquiry of course is to be made promptly and within the context of the obligation of the licensee under the rule. In this regard, the Commission has stated:

> A licensee is required to send the attacked person or group, within a reasonable time and in no event later than one week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice he is required to send a tape, transcript, or accurate summary to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligations. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the one-week period. *In the Matter of Amendment of Part 73 of the Rules*, 8 FCC 2d 721, 722 (1967).

A three months delay in seeking Commission advice obviously precludes any finding of a resonable attempt of compliance with the rule.

Accordingly, and for the reasons set forth above, it is determined that stations WGCB and WXUR failed to meet their obligations under Section 73.123 in that they failed within seven days of the attack to provide the United Church of Christ with a tape, transcript or accurate summary and to offer a reasonable opportunity to reply.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(For Chief, Broadcast Bureau).

F.C.C. 73R-216

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PLEASANT BROADCASTING CO., MOUNT PLEASANT, IOWA	Docket No. 18594 File No. BP-17235
DONALD K. VAN SLYKE, VERNE MCDONOUGH, JAMES J. DELMONT, ALFRED R. SUNDBERG, DWIGHT C. VREDENBURG, MARION M. COONS, VIRGIL MEYER, ROBERT M. STONE, CLARENCE H. MORTON, W. M. EIKENBERRY, JOHN E. KING, ALDO DELLA VEDOVA, GEORGE R. GARTON AND LEVORAH KELLER, D.B.A. CHARITON RADIO CO., CHARITON, IOWA	Docket No. 18595 File No. BP-17559
BCST COMPANY OF IOWA, INC. MOUNT PLEASANT, IOWA For Construction Permits	Docket No. 18596 File No. BP-17571

MEMORANDUM OPINION AND ORDER

(Adopted June 12, 1973; Released June 14, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND KESSLER.

1. The above-captioned mutually exclusive applications were designated for hearing by Commission Order, FCC 69-739, 18 FCC 2d 539, released July 10, 1969, on legal and financial qualifications issues against Chariton Radio Company (Chariton), *Suburban* issues against all three applicants, an areas and populations issue, a Section 307(b) issue, and a contingent comparative issue.[1] On February 22, 1972, Administrative Law Judge Ernest Nash released an Initial Decision (FCC 72D-13) recommending a grant of the application of BCST Company of Iowa, Inc. (BCST). He concluded that Chariton was disqualified,[2] thus mooting the 307(b) issue, and that BCST, which satisfied its burden of proof under the *Suburban* issue, was superior to Pleasant Broadcasting Company (Pleasant) under the comparative issue. Pleasant and Chariton filed exceptions to the Initial Decision and oral argument was held before a panel of the Review Board. In a Decision, released April 17, 1973 (—— FCC 2d ——, 27 RR 2d 257),

[1] A fourth application, that of Mount Pleasant Radio Company (Mount Pleasant), for an FM station in Mt. Pleasant was removed from the hearing and returned to the processing line by the Presiding Judge (FCC 70M-14, released January 6, 1970), and eventually dismissed by the Commission as a result of a "buy-out" agreement between Mount Pleasant and Pleasant Broadcasting Company. Pleasant's then pending application for an FM station was granted by the Commission on July 15, 1970. Pleasant is now the licensee of KILJ(FM), the only broadcast station in Mt. Pleasant.

[2] The Judge proposed denial of Chariton's application because the applicant failed to offer any evidence whatsoever in response to the legal and financial qualifications issues specified against it.

the Board unanimously affirmed the Administrative Law Judge's Initial Decision with some minor modifications. The Board also affirmed the Presiding Judge's earlier denial of a joint petition, filed by Chariton and Pleasant during the proceeding, which proposed, *inter alia*, the reimbursed withdrawal of Chariton from the proceeding and the substitution of Pleasant as the applicant for Chariton, Iowa.[3] Now before the Review Board is a petition for reconsideration, filed May 14, 1973, by Pleasant. The petition is opposed by BCST and the Broadcast Bureau.[4]

2. Contending that the Board "overlooked certain pertinent factors", Pleasant challenges our disposition of the *Suburban* and 307(b) issues. Pleasant does not, in its petition, dispute our disposition of the comparative issue. With one very minor exception, none of the arguments advanced by petitioner warrant reconsideration of our Decision. Pleasant first argues that one of the defects relied upon by the Board to disqualify it under the *Suburban* issue (*i.e.*, confining its community survey for its AM station to the smaller service area of its Mt. Pleasant FM station (KILJ)) is also present in BCST's survey, and that if Pleasant is disqualified, BCST must also be disqualified.[5] However, as BCST and the Bureau point out, this argument is now being raised for the first time in this proceeding,[6] and is therefore grossly late and disruptive of the Commission's processes. See Sections 1.106(c) and 1.277 (a) of the Commission's Rules.[7] *Cf. WNOW, Inc.* (*WNOW*), 38 FCC 471, 4 RR 2d 857 (1965).[8] In addition to being procedurally defective, the argument is without any basis in fact. The hearing record clearly shows that BCST did not confine its community survey to KILJ's 1 mv/m contour. Rather, BCST Exhibit 2 shows that BCST surveyed 48 persons living in nineteen communities outside of Mt. Pleasant.

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[3] Memorandum Opinion and Order, FCC 71M–686, released May 4, 1971.

[4] BCST and the Bureau filed oppositions on May 25, 1973, and May 29, 1973, respectively. Pleasant filed a reply on June 4, 1973.

[5] Pleasant does not contest the finding that it surveyed only persons living within the 1 mv/m contour of the FM station. It concedes this to be "substantially true".

[6] Pleasant did not raise this argument in its exceptions or at oral argument despite the fact that the Administrative Law Judge in his Initial Decision cited the above-mentioned defect as one of several reasons for disqualifying Pleasant. See paragraph 10 of the Judge's conclusions. In addition, the Presiding Judge made specific findings and conclusions on BCST's survey of outlying communities (see paragraphs 27, 28, 31, 32 and 33 of the Judge's findings and paragraphs 3–5 of his conclusions) and Pleasant did not except to any of them. Furthermore, in footnote 9 of our Decision, we pointed out that, "although Pleasant excepts to [the conclusion that BCST met its burden on the *Suburban* issue], no specific defect in BCST's survey is alleged." — FCC 2d at — n.9, 27 RR 2d at 263 n.9.

[7] Section 1.106(c) reads as follows:

> (c) A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:
>
> (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;
>
> (2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
>
> (3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

None of those circumstances are present here. Section 1.277(a) provides in pertinent part that, "any objection [to an Initial Decision] not saved by exception filed pursuant to this section is waived." In this connection, see note 6, *supra*.

[8] "Reconsideration will not be granted merely to permit [an applicant] an additional opportunity to present material, which has been continuously available, in order to make a better case for grant of its application." 38 FCC at 474, 4 RR 2d at 860. [Citations omitted.]

Eight of the nineteen communities (15 interviewees) are located outside KILJ's 1 mv/m contour. In our view, this survey of outlying communities satisfies Commission requirements. In contrast, Pleasant *concedes* that it did not survey outside the FM's service area. Therefore, since the factual foundation for Pleasant's argument fails, the argument itself must fail. Finally, we would point out that the Board and the Presiding Judge relied on numerous deficiencies in Pleasant's *Suburban* showing to disqualify it, and not solely on its failure to survey outside the FM service area, as Pleasant implies. See paragraph 5 of our Decision, —— FCC 2d ——, 27 RR 2d at 263; and paragraphs 6–13 of the Judge's conclusions.[9]

3. Pleasant's arguments with respect to the 307(b) question and its joint agreement with Chariton are, as the Bureau states, "simply a rehash of the position which it has heretofore asserted and on which the Review Board ruled in great detail." It is well established that reconsideration will not be granted "merely for the purpose of again debating matters on which [the Commission or Board] has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, 686, 3 RR 2d 316, 317 (1964), affirmed *sub nom. Loraine Journal Company* v. *FCC*, 122 U.S. App. D.C. 127, 351 F. 2d 824, 5 RR 2d 2111 (1965), cert. denied 383 U.S. 967 (1966). See *Cable TV Company*, 33 FCC 2d 787, 23 RR 2d 990 (1972). In this case, petitioner advances the same arguments it made in its exceptions and oral argument. Those arguments are all answered in paragraphs 2–4 of our Decision, —— FCC 2d at ——, 27 RR 2d at 260–62. Pleasant has presented no substantive arguments which persuade us to depart from our prior determination.[10] As we held in our Decision, the failure of the community of Chariton, Iowa, to be considered under the 307(b) issue by the Presiding Judge and the Board did not result from any action taken by us, but rather by the failure of Chariton Radio Company to prosecute its application for said community. The Judge and the Board merely applied existing Commission policy to the facts of record.

4. Despite the shortcomings in Pleasant's petition, we have carefully re-examined the record in light of its arguments. Based on our re-evaluation of the record, we again conclude that the Administrative Law Judge was fully justified in refusing to approve the joint agreement submitted by Pleasant and Chariton; that he was justified in refusing to grant the associated petitions for leave to amend; that Chariton lacks the requisite legal and financial qualifications to be a Commission licensee; that Pleasant failed to meet its burden of proof under the *Suburban* issue; and, finally, that even if Pleasant were qualified, BCST would be preferred over Pleasant under the standard

[9] We reject Pleasant's contention that "the standards for community needs surveys are vague, indefinite and unclear." The *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971), was adopted, in part, to clarify the requirements for community surveys, and clearly sets out the requirements in those areas where Pleasant's survey has been found deficient.

[10] The Board agrees with Pleasant that the figure of $20,711.56 mentioned in paragraph 4 of our Decision is not correct and that the correct figure is $8,000. Nevertheless, the difference in figures has no impact on the Board's conclusions with respect to the joint agreement and 307(b) question.

comparative issue. Therefore, we again conclude that a grant of the BCST application would better serve the public interest, convenience and necessity.

5. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed May 14, 1973, by Pleasant Broadcasting Company, IS GRANTED to the limited extent indicated in footnote 10 of this Memorandum Opinion and Order and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
CONGRESSMAN HERMAN BADILLO, NEW YORK, N.Y.
Concerning Political broadcast by Station WNEW–TV under section 315

MAY 30, 1973.

SPECIAL DELIVERY
MR. CHARLES KINSOLVING,
Campaign Manager,
New Yorkers For Badillo,
225 West 57th Street,
New York, N.Y. 10019

DEAR MR. KINSOLVING: This is in reply to your letter of May 29, 1973, filed on behalf of Congressman Herman Badillo, concerning Station WNEW–TV, New York, New York.

From the information you have provided the Commission it appears that Congressman Badillo is a candidate for the Democratic mayoral nomination in New York City in the primary election to be held on June 4, 1973; that on May 10, 1973 one of his opponents, Congressman Mario Biaggi, appeared on WNEW–TV; that another opponent of his, Alfred Blumenthal, appeared on the station on May 25, 1973; and that you requested, by letter of May 25, 1973, equal time for Congressman Badillo under Section 315 of the Communications Act.

WNEW–TV rejected your request for time on the grounds that it had not been made within seven days of the first prior use of the station by Congressman Biaggi. You contend that WNEW–TV "has made an arbitrary and unfair ruling in this instance," and that "Even if the station is on firm ground regarding the seven-day limitation stemming from the May 11 broadcast, it certainly seems that Mr. Badillo is entitled to time based on Mr. Blumenthal's May 25 broadcast."

Section 73.657(e) of the Commission Rules (47 C.F.R. 73.657(e)) states:

> *Time of request.* A request for equal opportunities must be submitted to the licensee within one week of the day on which the first prior use, giving rise to the right to equal opportunities, occurred; *Provided, however,* That where a person was not a candidate at the time of such first prior use, he shall submit his request within one week of the first subsequent use after he has become a legally qualified candidate for the office in question.

Thus it appears that WNEW–TV's rejection of Congressman Badillo's request for time was made pursuant to this rule. Congressman Badillo's right to equal opportunities is derived from Congressman

Biaggi's "first prior use" on May 10, and not from Mr. Blumenthal's May 25 appearance. The above cited rule was revised to its present state in 1970 (FCC 70–456) to avoid any "adverse effect upon the orderly planning of station activities in political broadcast situations." Thus, in adopting this rule the Commission stated:

> . . . the proposed revision of the rule would permit licensees to be able to determine the extent of their future Section 315 obligations within a reasonable time after such obligations could arise and at the same time considerable flexibility on the part of candidates for public office, having made timely requests for equal opportunities, to schedule their appearances at a reasonably later date consonant with their particular campaign policies.

In view of the foregoing it appears that Congressman Badillo is not entitled to "equal opportunities" in the situation herein and no further Commission action appears warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(For Chief, Broadcast Bureau).

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint by
GORDON F. HUGHES, NEEDHAM, MASS.
Concerning Section 315, Political broadcast Re Boston Broadcasters, Inc., Station WCVB–TV

JUNE 13, 1973.

BOSTON BROADCASTERS, INC.
Licensee of WCVB–TV,
5 TV Place
Needham, Mass. 02192

Gentlemen: This is in reference to the October 5, 1972 complaint filed on behalf of Mr. Gordon F. Hughes against WCVB–TV, Needham, Massachusetts.

Mr. Hughes alleges that as a candidate for the 7th Congressional District seat in the September 19 primary, WCVB–TV offered him free time to appear on a September 17, 1972 program featuring all the Congressional candidates in the station's viewing area; that he accepted this offer and was advised by the station that he would appear on the air between 2:45 and 3:15 p.m. on the 17th; that he arrived at the station's studios at or about 3:00 p.m. but was informed that he had arrived too late to appear and that his time had been cancelled; and that this failure to provide time was discriminatory and was a major factor in his defeat.

You responded to a Commission inquiry on December 22, 1972 stating that WCVB–TV had offered each Congressional candidate equal amounts of free time on September 17, 1972; that 37 candidates were due to appear in the studio or provide tape or film; that Mr. Hughes was notified and accepted the offer and was also advised that he should arrive at the WCVB–TV studios at 2:30 p.m.; that Mr. Hughes arrived approximately 30 minutes late stating that he had been held up in traffic; that even though every effort was made to insure Mr. Hughes could appear if he arrived, other candidates had been scheduled so that waiting an extended period of time for him would have created re-scheduling problems; that the candidates for the 7th District appeared between 2:40 and 2:53 p.m.; that when Mr. Hughes had not arrived by 2:40, the order of 7th District candidates was changed so that Mr. Hughes could appear last; that candidates for the 9th District were broadcasting at the time Mr. Hughes arrived; and that you feel your actions were not unreasonable under the circumstances for had you made an exception for Mr. Hughes and allowed him to appear after his arrival, he would have been given an unequal opportunity. Mr. Hughes replied by reiterating

that WCVB–TV's actions were discriminatory and violated Section 315 of the Communications Act of 1934, as amended, and that such violation resulted in his defeat in the primary. Section 315(a) states, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.

The Federal Election Campaign Act of 1971 amended Section 312 of the Communications Act by adding the following subsection under which the Commission may revoke a station license:

> (7) For willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The information before the Commission indicates that all of the Congressional candidates accepting the free time offer appeared on September 17, except Mr. Hughes, and that even though he requested equal time, he was not afforded a later opportunity to appear because of your policy of not selling time and because you feared a later appearance would amount to an "unequal" opportunity.

From the foregoing, it appears that you were unreasonable in your rejection of Mr. Hughes' request for equal opportunities. The offer of free time to all of the Congressional candidates was based on your policy of not selling time to candidates, and therefore it was incumbent on you to assure that all candidates who accepted your offer received broadcast time. The basic question for the Commission to consider at this time is whether Mr. Hughes' arrival at the station at 3:00 p.m. instead of 2:30 p.m. was so late as to relieve you of any obligations to him under Section 315. We do not think so. In your December 22 reply to the Commission's inquiry you stated:

> On August 31, 1972, we sent Mr. Hughes a further letter advising him to be at our studios no later than 2:30 p.m., i.e., at least 15 minutes prior to his expected appearance between 2:45 and 3:15 p.m.

However, your August 31 letter only stated:

> . . . You will be seen sometime between 2:45 and 3:15 p.m. We will look for you at our studios in Needham at least 15 minutes prior to the time of your appearance listed above.

Mr. Hughes arrived at 3:00 p.m., which was between the times specified for his appearance in your August 31 letter. In this connection we note that the actual period during which Mr. Hughes would have appeared ended at approximately 2:53 p.m., some 22 minutes prior to the time he was advised it would end. We also note that nowhere in your letter to Mr. Hughes was he advised that if he failed to arrive at precisely 2:30 p.m., or if he were late, he would not be able to appear on the broadcast, and/or would have his broadcast time cancelled.

Although we find that you were unreasonable in failing to afford Mr. Hughes the time he requested, the incident appears to have been an isolated occurrence, and the problem arose because of your attempts to present programs featuring a large number of legally qualified candidates for various Congressional seats. Accordingly, no further Commission action will be taken at this time. However, this letter will be

109-044—73——9

placed in the station's file where it will be available for further reference.

We also wish to point out the necessity for prompt filing of political broadcast complaints. Neither Mr. Hughes nor the licensee contacted the Commission at the time of the broadcast in question, and Mr. Hughes did not file his complaint until nearly three weeks after the broadcast and the primary election. Thus the Commission was never in a position to resolve this problem at the most effective time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(For Chief, Broadcast Bureau).

F.C.C. 73R-214

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN BROADCASTING CO. (WGHP-TV), HIGH POINT, N.C. For Renewal of Broadcast License	Docket No. 18906 File No. BRCT-574
FURNITURE CITY TELEVISION CO., INC., HIGH POINT, N.C. For Construction Permit for New Television Broadcast Station	Docket No. 18907 File No. BPCT-4302

MEMORANDUM OPINION AND ORDER

(Adopted June 8, 1973; Released June 12, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER DISSENTING WITH STATEMENT; BOARD MEMBER NELSON ABSENT.

1. Before the Review Board is a petition to modify issues, filed April 12, 1973, by Furniture City Television Company, Inc. (Furniture City), requesting modification of the Rule 1.65 issue which the Review Board added against Southern Broadcasting Company (Southern) in a Memorandum Opinion and Order, 38 FCC 2d 461, 25 RR 2d 1138, released December 8, 1972.[1] [2]

2. Furniture City bases its request for modification of the Rule 1.65 issue specified against Southern on information supplied to the Commission by Southern in a petition for leave to amend filed on April 3, 1973.[3] In that amendment, Southern informed the Commission that Mr. Kenneth F. Mountcastle, a 1.94% stockholder of Southern, is a director and vice-president of Reynolds Securities, Inc., a New York brokerage firm, which is a party defendant in seven separate anti-trust suits.[4] Furniture City notes that the Commission is particularly concerned with individual principals of an applicant who have participated directly in making decisions which violate anti-trust

[1] The Review Board added the following Rule 1.65 issue against Southern because of that applicant's alleged failure to advise the Commission that two of its stockholders were involved in anti-trust suits brought against the Wachovia Corporation:

To determine whether Southern Broadcasting Company (WGHP-TV) has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial required changes in its application and, if not, the effect of such non-compliance on the basic and/or comparative qualifications of the applicant to be a broadcast licensee.

[2] Also before the Review Board are the following related pleadings: (a) opposition, filed April 23, 1973, by Southern; (b) Broadcast Bureau's comments, filed April 23, 1973; and (c) reply, filed May 3, 1973, by Furniture City.

[3] This petition for leave to amend was granted and the amendment was accepted by the Presiding Administrative Law Judge in an Order, FCC 73M-466, released April 17, 1973.

[4] Furniture City attaches to its petition the pages of the Southern amendment of April 3, 1973 containing the information regarding the anti-trust suits filed against the Reynolds company. The attachment reveals that the first suit was filed on April 14, 1971, and the latest complaint was filed on February 28, 1973.

laws.[5] Petitioner contends that since Mr. Mountcastle is an officer and director of the corporation which has been named as a party defendant in the anti-trust actions, the matter is therefore of decisional significance and bears directly on Southern's qualifications to remain a Commission licensee. Therefore, petitioner maintains that Southern's failure to timely notify the Commission of the involvement of its principal in these anti-trust suits, even though these complaints have been pending in some cases for two years, warrants further inquiry under the existing 1.65 issue. Furthermore, petitioner alleges that Southern was aware of the pending actions since it has conducted quarterly and more recently monthly surveys of its directors to insure that all business interests are reported within the thirty-day period authorized by Section 1.65 of the Rules.[6] Finally, petitioner argues that the existing Rule 1.65 issue against Southern (see Note 1, *supra*) is framed in language broad enough to include inquiry into the additional facts and circumstances recited herein. The Broadcast Bureau supports Furniture City's request, noting that it is clear from the Board's December 8, 1972 ruling, *supra*, that a renewal applicant is required to amend its application pursuant to Section 1.65 of the Rules to report the pendency of civil anti-trust suits against companies in which one or more of the applicant's stockholders have a substantial interest. The Bureau also notes that Southern delayed four months, after addition of the issue, in reporting those anti-trust suits pre-dating the Board's ruling and did not report the two most recent suits in a timely manner.

3. In opposition, Southern asserts that, prior to the Review Board's December 8, 1972, Order, it believed that it was not required, as a renewal applicant, to report non-broadcast anti-trust suits. Southern claims that it was only after the Review Board stated in the above mentioned Order that *all* applicants, whether new or renewal, must notify the Commission of the existence of *all* anti-trust suits involving applicants or parties to an application, that Southern diligently sought out such information from all of its stockholders, not just its officers and directors. As soon as it became aware of the existence of the suits, Southern maintains, it reported them to the Commission.

4. The Review Board will grant the request for modification of the existing Rule 1.65 issue against Southern. The Commission has long been concerned about an applicant's involvement with anti-competitive conduct and the effect such involvement may have upon the applicant's character qualifications. See *Report on Uniform Policy as to Violation by Applicants of Laws of the United States*, Vol. 1, Part III, RR 91:495 (1951); *NBC* v. *U.S.*, 319 U.S. 190 (1943); and *Patroon Broadcasting Co., Inc.*, 2 FCC 2d 431, 6 RR 2d 939 (1966). Southern's argument that it believed that it was not required as a renewal applicant to report non-broadcast anti-trust suits prior to the Board's December 8, Order, must be rejected for the same reasons advanced by the Board in that Order, wherein it stated: ". . . the Com-

[5] Petitioner cites *Mansfield Journal* v. *FCC*, 86 U.S. App. D.C. 102, 180 F. 2d 28, 5 RR 2074(e) (1950).

[6] To support this allegation, Furniture City submits the Petition for Leave to Amend, filed February 23, 1973, by Southern, wherein it recited those procedures.

mission's policy of requiring the reporting of anti-trust suits by renewal applicants has been clear for several years. See *Westinghouse Broadcasting Company*, 22 RR 1023 (1962); *General Electric Company*, 2 RR 2d 1033 (1964)." Southern's further contention that it was not aware of the requirement of reporting the business interests of *all* its stockholders, not just its directors and officers, is also unpersuasive in light of the Board's prior ruling in this very proceeding.[7] Moreover, as noted by petitioner, Southern's contentions fail to explain the delay of four months until April 3, 1973, between the issuance of the Board's December Order and the filing of Southern's amendment advising the Commission of the anti-trust actions in question. In light of the foregoing, the Board is of the opinion that the existing Rule 1.65 issue against Southern should be modified to encompass the alleged failure of Southern to report the involvement of one of its principals in the Reynolds Securities, Inc., anti-trust suits.

5. Accordingly, IT IS ORDERED, That the petition to modify issues, filed April 12, 1973, by Furniture City Television Company, Inc., IS GRANTED: and

6. IT IS FURTHER ORDERED, That the Rule 1.65 issue against Southern Broadcasting Company added by the Review Board by Memorandum Opinion and Order (38 FCC 2d 461, 25 RR 2d 1138, released December 8, 1972) IS MODIFIED to include the matters indicated herein.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

This interlocutory action by the Board calls for a Commission answer to the question of whether the addition of a Section 1.65 issue here extends the Commission's Report relating to *Reporting of Changed Circumstances*, 3 RR 2d 1622 (1964) beyond its scope and purpose. While experience in 1964 dictated the need for the Commission's Report, *supra*, and for Section 1.65 of the Rules and it now also demonstrates the continuing need for the Rule, I believe that after nine years of such experience in the administration of the Rule, there is now a need for more judicious administration.

The primary question presented with respect to the inclusion of a Section 1.65 issue is whether the failure to report might reasonably have a *significant* impact on the Commission's decisional processes, or stated another way whether it might reasonably subvert the decisional processes with respect to a *particular application*. That is what the inclusion of a Section 1.65 issue should be about—and not whether the applicant failed to report some matter of little significance to the public interest judgment with respect to *that particular application*. See, paras. 4–7 of the Commission's Report, *supra*.

[7] See *Southern Broadcasting Co.* (*WGHP–TV*), 33 FCC 2d 1044, 23 RR 2d 1197 (1972), where the Review Board added a Rule 1.65 issue against Furniture City for failing to notify the Commission that a 3.3% stockholder of Furniture City who was neither an officer nor director of that corporation was a vice-president, director and 15% stockholder of a corporation accused of anti-competitive conduct in a non-broadcast field.

It is my view that in administering Section 1.65 the Board in several prior actions has gone beyond the prescription of the Commission's Report, *supra*, and the intent of the Rule. I, accordingly, was in error when I joined the majority opinion in *Southern Broadcasting Company* (WGHP–TV), 33 FCC 2d 1044 (1972), where a Section 1.65 issue was added because of the failure of an applicant to notify that a 3.3% stockholder—who was neither an officer nor director of the applicant company—became involved in anti-competitive conduct in a non-broadcast matter. On the basis of hindsight, I cannot see how this failure might reasonably have a *significant* impact on the decisional process. For this same reason, I would not enlarge the issue relating to the subject matter which involves a 1.94% stockholder who is not an officer or director of the applicant company.

In my view, these instances do not present close questions, and the time is now ripe for the Board to delineate appropriate limitations with respect to the inclusion of Section 1.65 issues; otherwise it can be reasonably anticipated that our already protracted hearings will become more so.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
SPENCER ORGANIZATION INC., EMERSON, N.J.
Clarification of ruling

MAY 30, 1973.

MR. WILLIAM C. SPENCER,
Spencer Organization Inc.,
428 Old Hook Road,
Emerson, N.J. 07630

DEAR MR. SPENCER: This is in response to your letter of May 9, 1973 seeking clarification of this office's letter to you of May 7, 1973. Our letter informed you that on May 2, 1973 the Bureau had ruled on the fairness doctrine complaint of Accuracy in Media, Inc. (AIM) against the NBC Television Network with respect to the program "Pensions: The Broken Promise" and that this ruling should also be considered dispositive of your complaint against Station WNBC–TV, New York, New York, concerning the same program. You wish to be advised as to whether or not your complaint has been thereby upheld.

As set forth in our letter to you of April 2, 1973, at the time your initial letter of complaint of March 23, 1973 was received, the Commission was engaged in the review and consideration of the AIM complaint against the NBC Television Network which concerned the same program cited in your letter. You were also informed that the final pleadings in the matter had been filed on February 28, 1973 and that the Bureau's ruling thereon was about to issue. Under applicable Commission procedures, therefore, your complaint could not be considered in conjunction with the Bureau's ruling without affording NBC, as licensee of WNBC–TV, an opportunity to respond thereto and thereby further delaying determination of the matter. The Bureau's ruling of May 2, 1973 is, however, dispositive of your complaint in the sense that the fairness doctrine issues determined therein were the same as those which you had raised, and that compliance with the Bureau's ruling by the NBC Television Network would effectuate compliance by its affiliates which broadcast the program in question and, in particular, by the stations licensed to NBC, Inc., including WNBC–TV. Accordingly, separate consideration of your particular complaint is unnecessary at this time. Should NBC file an Application for Review by the full Commission of the Bureau's May 2 ruling, you will have an opportunity to file any comments you wish concerning such Application within fifteen days after it is filed with the Commission. By copy of this letter, NBC is being asked to serve you with a copy of any Application it may file. In this connection, on May 23, 1973, the Commission extended until June 22, 1973 the time for filing an Application

for Review of the Bureau's May 2 ruling. A copy of that Order is enclosed.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(For Chief, Broadcast Bureau).

F.C.C. 73D–3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of HORNE INDUSTRIES, INC., SEARCY, ARK.	Docket No. 18989 File No. BPH–6810
TELLUM BROADCASTING CO., SEARCY, ARK. For Construction Permit	Docket No. 18990 File No. BPH–6953

APPEARANCES

Eugene T. Smith, Esq., on behalf of Horne Industries, Inc.; *William Howard Payne, Esq.*, on behalf of Tellum Broadcasting Company; and *Kathernine Savers McGovern* and *Theodore D. Kramer, Esqs.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued January 22, 1973; Effective April 27, 1973 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. The Commission designated by Order released September 16, 1970 (FCC 70–975), the above-captioned mutually-exclusive applications for hearing in a consolidated proceeding. Horne Industries, Inc. (hereinafter Horne), Searcy, Arkansas, requests 99.3 mcs., #257; 3 kw(H); 3 kw(v); 153 feet. Tellum Broadcasting Company of Searcy, Inc. (hereinafter Tellum), Searcy, Arkansas, requests 99.3 mcs, #257; 3 kw(h); 3 kw(V), 285 feet. The Order specified the following issues:

> 1. To determine whether Tellum Broadcasting has available the additional $33,402 required for construction and first-year operation of its proposed station without reliance on revenues to thus demonstrate its financial qualifications.
>
> 2. To determine the efforts made by Horne Industries to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.
>
> 3. To determine the efforts made by Tellum Broadcasting to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.
>
> 4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications for construction permit should be granted.

2. On April 16, 1971, the Review Board released a Memorandum Opinion and Order, 28 FCC 2d 454, in which Issue 1 was modified as follows:

To determine, with respect to the application of Tellum Broadcasting Company of Searcy, Inc., the basis of the applicant's estimated construction costs and whether such costs are reasonable and whether Tellum Broadcasting has available the amount required for first-year operation of its proposed station without reliance on revenues to thus demonstrate its financial qualifications; and

The Review Board also enlarged the issues by the addition of the following:

(a) To determine whether Tellum Broadcasting Company of Searcy, Inc. has complied with the provisions of Section 1.65 and/or Section 1.514(a) of the Commission's Rules, and, if not, to determine the effect of such non-compliance on the basic and comparative qualifications of Tellum Broadcasting Company of Searcy, Inc. to be a Commission licensee; and

3. On March 31, 1972, Horne and Tellum filed a Joint Petition for Approval of Agreement which contemplated dismissal of the Tellum application, the grant of Horne's application, and reimbursement to Tellum. An Order released August 4, 1972 (FCC 72M–1004), stayed disposition of the pleadings filed under Section 1.525 and a hearing was scheduled on the Rule 1.65/1.514 issue against Tellum.

4. Prehearing conferences were held on January 11, 1971, June 18, 1971, November 24, 1971, December 16, 1971, and April 28, 1972. Hearing sessions were held on August 23 and 24, 1972, in Washington, D.C. Timely proposed findings, conclusions, as well as reply findings were submitted by the parties.

5. Since the invitation or direction to the parties to submit proposed findings and conclusions among other things, serves the object of expedition in arrival at a fair and just resolution of issues in administrative proceedings, liberal use of those most reflective of the record evidence will be made hereinafter. Save for minor matters of language preference, more editorial than substantive, the Bureau's proposed findings are considered faithful and accurate echoes of the record; hence, in the main, they will be adopted. This, of course, in no way disparages the otherwise commendable efforts of the parties applicant in their submissions.

6. For the reasons set out hereinafter, this, as an Initial Decision shall find and conclude that Tellum Broadcasting Company of Searcy Inc. lacks the basic qualifications to be a Commission licensee.

FINDINGS OF FACT

7. The single issue in this proceeding concerns the failure of Levoy Patrick Demaree to list certain liabilities on his financial statement filed with the original application (Section 1.514) and/or his failure to timely amend his application to inform the Commission of liabilities subsequently incurred (Section 1.65). The Review Board was unable to determine whether these liabilities were intentionally concealed

from the Commission; thus, the issue was specified on a disqualifying basis.[1]

8. Tellum's application was filed with the Commission on November 26, 1969, and accepted December 18, 1969. Levoy Patrick Demaree is President, Director and 49% stockholder. His wife, Reba Pearl Demaree is Vice-President, Director and 1% stockholder. Paul Samuel Demaree, the brother of Levoy Patrick Demaree, is Treasurer, Director and 49% stockholder. His wife, Martha Louise Demaree is Secretary, Director and 1% stockholder (Tellum Application, Section II, Table I and Question 21c). The preparation of the application was done primarily by Levoy Patrick Demaree and Paul Samuel Demaree.

9. Levoy Patrick Demaree has been in radio broadcasting since 1956. In 1966 his first ownership interest was acquired in 5% of the stock of Big Chief Broadcasting Co. of Fayetteville, Inc., (Big Chief) licensee of Station KFAY, Fayetteville, Arkansas.[2] On November 1, 1968, Mr. Demaree increased his ownership of Big Chief to 20% and became Secretary-Treasurer of the corporation (Tellum Application Section II, Table II). From 1966 until November 1, 1968, Demaree was station manager of KFAY. During that period he was not a guarantor on any notes for Big Chief.

10. Sometime prior to November 8, 1968, L. M. Jack Beasley, President of Big Chief, decided that the corporation should purchase the land adjoining KFAY. This matter was not discussed at a stockholders' meeting. After learning that the owner of the adjoining property was Cecil Harris, Beasley and Demaree went to the offices of Harris Accounting Service, owned by the brother of Cecil Harris, to discuss the terms of purchasing the property. There were two meetings at the offices of Harris Accounting Service. Whether Cecil Harris was present at these meetings is not clear. Demaree does not remember exactly what was discussed at the first meeting, although he thinks they may have discussed the price of the property. Similarly, although Demaree discussed the purchase of the Harris property with Beasley, he does not remember discussing the financing terms, such as liens, security agreements or personal guarantees. The contract was signed at the second meeting at the office of Harris Accounting Service on November 5, 1968. The amount of the contract was $3,500 payable $500 down and the balance payable at $50 per month plus interest. The contract, drawn up by Harris Accounting Service, states in the first paragraph:

> This agreement made and entered into this the 5th day of November, 1968, by and between Cecil T. Harris, and Eva Mae Harris, his wife, hereinafter known as the sellers, and Big Chief Broadcasting Co. of Fayetteville, Arkansas, L. M. Back [sic] Beasley and Pat Demaree, hereinafter known as the buyers. . . . (Tellum Ex. 1).

Although Demaree admits his personal liability on the contract, he asserts that he did not realize at the time he signed the contract that he was a personal guarantor. Demaree's explanation for his failure to

[1] The comparative aspect of the issue is moot in view of the pending joint petition filed pursuant to Section 1.525 of the Rules.

[2] On September 14, 1966, the Commission granted BAL–5840, assigning the license of KFAY from H. Weldon Stamps to Big Chief. Big Chief was created for the purpose of buying KFAY from Stamps (BAL–5840, Official notice taken).

know that he was personnally liable was that he thought he signed the agreement as an officer of Big Chief. He further asserts that he did not read the document nor did he have an attorney review the document before he signed it. He maintains that he was either confused as to his own liability by what occurred when the documents were signed or that he was forgetful.

11. Demaree, as Secretary-Treasurer of Big Chief, made payments on the Harris obligation each month. Payments were made to Harris Accounting Service from the account of Big Chief. Demaree signed all of the checks in his capacity as Secretary-Treasurer of Big Chief. The balance on the contract was $800.00 as of July 11, 1972 (Tellum Ex. 1A).[3]

12. Demaree claims that he did not realize his personal liability on the Harris contract until sometime after December 7, 1970, the date depositions were taken in this proceeding, and, to the best of his recollection after the petition to enlarge issues was filed on February 9, 1971.[4] It was Mr. Harris who told Demaree that he was personally liable on the Harris contract. Demaree asked Harris about his personal liability because he wanted to make a thorough check of his obligations. Although Demaree states that he probably checked with Harris as a result of the deposition session, Demaree could not remember exactly when he called Harris. At the deposition session on December 7, 1970, Demaree was interrogated as to his financial condition. When asked if his signature as an individual appeared on any of the Big Chief notes, including the Cecil Harris agreement, Demaree replied that he would have to go over them one at a time. He did not have copies of those Big Chief obligations with him and he never specifically stated whether or not he had signed the Harris agreement as an individual. Demaree's attorney agreed to provide copies of all of the notes to Smith, Horne's attorney and any other data relative to Demaree's personal liability on any indebtedness.[5] Tellum was aware of Horne's area of inquiry as early as October 9, 1970, the date of the Notice to Take Deposition upon Oral Examination. Moreover, Horne's Motion for Production of Documents, filed October 16, 1970, specifically requested copies of all evidence of the accuracy of liabilities listed on the Demarees' balance sheets. These motions were granted by Order, FCC 70M–1516, released November 6, 1970 (Official Notice taken).

13. Demaree also spoke to Beasley and Thompson, Vice-President of Big Chief, after the deposition session. He states that to the best of their recollection they (Beasley, Thompson and Demaree) were not personally obligated on the Harris agreement.[6]

14. Demaree did not report his personal liability on the Harris note to the Commission until Tellum filed its June 2, 1971 amendment.[7]

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[3] Since the payments were $50 per month, assuming that thirteen payments had been made by November 26, 1969, the date the Tellum application was filed, a total of $2,350 was still owed.

[4] However, see Exh. K to Motion to Enlarge Issues, wherein Demaree, on *January 1, 1971*, acknowledged that he had personally signed the Harris agreement (Motion to Enlarge filed by Horne, Official Notice taken).

[5] (Deposition of Levoy Patrick Demaree, p. 17–19, Official Notice taken).

[6] Thompson was not a signator to the Harris Contract and there is no evidence that he participated in any way (Tellum Ex. 1).

[7] This was subsequent to the Board's action enlarging the issues to inquire into this matter.

Demaree could not remember exactly why he did not formally inform the Commission of this obligation sooner.

15. Demaree also failed to report his personal liability on a mortgage when Tellum first filed its application. On January 17, 1969, Demaree and his wife sold a house in Barling, Arkansas to Mr. and Mrs. Lymon F. Hart for $16,500. Demaree has an outstanding mortgage with the First Pyramid Life Insurance Company which the Harts did not assume as part of the consideration on the purchase of the house. The mortgage was dated June 1, 1965. Demaree took a second mortgage from the Harts in the amount of $2,700, payable $50 per month. The Harts also make the monthly payments to First Pyramid Life. Demaree has not personally made payments on that mortgage since he sold the house to the Harts. The remaining balance on the First Pyramid Life mortgage was $9,000 as of July 19, 1972.[8]

16. Demaree did not report his primary liability on the mortgage, even though he was aware of it, because he believed the house was worth more than Hart owed on it. Consequently, he felt neither a financial threat nor an obligation. The Pyramid Life mortgage was first reported in Tellum's June 2, 1971, amendment.

17. Demaree followed this line of reasoning with regard to two other liabilities, a mortgage on a house and five acres and payments on an 80 acre farm. He listed the former as a liability because he was making payments on it. He listed a 50% liability on the 8 acre farm because he made 50% of the payments.[9] If his brother had defaulted on the other 50% payments, Demaree concedes that he would have had to make a 100% payment.

18. Levoy Patrick Demaree is also Secretary-Treasurer of Little Chief Broadcasting, Fayetteville, Arkansas (Little Chief), licensee of KKEG–FM (formerly KFAV–FM). Little Chief was formed for the purpose of buying KFAV–FM from Stamps Radio Broadcasting, Inc.

19. The agreement, dated June 30, 1969, providing for the sale of KFAV–FM was executed by Weldon Stamps, President of Stamps Radio and by Lovelle Morris "Jack" Beasley, President of Little Chief, Omer Carl Thompson, Vice President of Little Chief, and Levoy Patrick Demaree, Secretary-Treasurer of Little Chief. The terms of the agreement provided that Little Chief would pay Stamps Radio $35,000, the first $7,500 to be paid upon execution of the agreement, the next $5,000 on or before December 31, 1969, and the remaining $22,500 to be paid at the rate of $450 per month including principal and 7% interest until the balance is paid, with the first payment on January 1, 1970.[10] The obligation of Stamps Radio was paid off July 7, 1972. Demaree, in his capacity of Secretary-Treasurer,

[8] The original amount of the mortgage was $11,500 (Tellum Exhibit 2A). The record does not disclose the balance due as of the date the Tellum application was filed (November 26, 1969).

[9] He similarly listed an asset representing 50% of the value of this property.

[10] The application for assignment of license, BALH–1240 (Official notice requested) filed July 7, 1969, was granted November 7, 1969 and effectuated November 8, 1969. Although Demaree's balance sheet in the Tellum application is silent as to the obligation to Stamps, the Tellum application, Section II, Question 19, thereof, does cross-reference BALH–1240. However, Demaree's balance sheet in BALH–1240 is also silent as to the Stamps' obligation.

signed all of the checks except for two which were unsigned by anyone, from Little Chief to Stamps Radio.

20. In addition to executing the agreement as officers of Little Chief, Beasley, Thompson and Demaree each personally endorsed the agreement. Page 4 of the agreement states:

> For a valuable consideration, the receipt of which is hereby acknowledged, Lovell Morris "Jack" Beasley, Levoy Patrick Demaree and Omer Carl Thompson jointly endorse the foregoing agreement.
> Dated this 1st day of July, 1969.

The signatures of those individuals follow.

21. Although Demaree personally endorsed the agreement, he maintains that he did not understand at that time that he had a secondary liability. He remembers signing the agreement as secretary-treasurer of Little Chief on page 3, but he does not remember signing as a personal endorser. The signatures on pages 3 and 4 are signed at the same time, although the former bears the date of June 30, 1969, and the latter a date of July 1, 1969.

22. The Stamps liability, incurred on June 30, 1969 was not reported to the Commission until June 2, 1971.[11] Demaree had consulted with his local attorney, Niblock, in February or March 1971. He believes that he was told that he was liable on the Little Chief agreement with Stamps Radio just before Tellum filed its June 2, 1971 amendment. Demaree also states that he did not inform the Commission of the two notes on which he was personally liable (the Harris note and the Stamps note) because he thought his deposition, in which the notes were mentioned, would be filed with the Commission. This explanation is inconsistent with Demaree's testimony in his deposition that he was not personally liable on the Stamps note (deposition of Levoy Patrick Demaree, pp. 19–21).

23. On March 24, 1970, Little Chief signed a note for a loan in the amount of $11,616.48 including interest payable to the McIlroy Bank in 36 monthly installments of $322.68. The balance as of June 28, 1972 was $3,226.80. The notes bears the personal endorsement of Beasley, Thompson and Levoy Patrick Demaree. Demaree knew that he was personally liable at the time he signed the note, but he did not inform the Commission of this liability because the note was being paid by the corporation. Beasley and Thompson had also personally endorsed it, and Demaree believed there was very little chance that he would have been held personally liable. Demaree was sure that if Little Chief could not pay the note that Beasley and Thompson could. Demaree's attitude is summarized by the following statement:

> I would like to say that maybe this accounts for some of the mistakes I have made here. I do have complete faith in these people [Beasley and Thompson] that I am in business with. Maybe this is the reason that I have been a little careless.

This note was first reported to the Commission in Tellum's June 2, 1971 amendment (Horne Ex. 1, p. 9–8).[12]

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[11] This was after the Board's action enlarging the issues with regard to other unreported liabilities.

[12] This was subsequent to the Board's enlargement of the issues (FCC 71R–120).

24. Big Chief borrowed $4,375.44 including interest from the McIlroy Bank and signed a note in that amount on January 19, 1971. The security for the note was a 1971 Chevrolet wagon. The balance as of June 28, 1972 was $2,430.80. Demaree signed the note as an officer of Big Chief and also personally guaranteed the note and consequently was secondarily liable on it. This note was reported for the first time in Tellum's June 2, 1971 amendment (Horne Ex. 1, p. 9–8).[12a]

25. On January 13, 1972, Levoy Patrick Demaree signed a note payable to the First National Bank and Trust Company of Muskogee in the amount of $42,500. This note was co-signed by his brother, Paul Samuel Demaree and endorsed by Wheeler Mayo. The loan was for the purpose of purchasing 49% of the stock of Big Basin Broadcasters. This stock was pledged as security for the loan. Levoy Patrick Demaree received 24% of the stock, Paul Samuel Demaree received 25% of the stock and the remaining 51% was owned by Wheeler Mayo. These obligations were reported to the Commission on February 15, 1972.

26. Paul S. Demaree also signed another note in his capacity as an officer of Big Basin, in the amount of $40,000, payable to the First National Bank and Trust Company. He is not personally liable on this note, nor is his brother, Levoy Patrick Demaree.

27. In the Designation Order, *supra*, the Commission concluded that Tellum required $40,000 to construct and operate its proposed facility for one year without revenues. In addition the Board noted that Tellum failed to explain the absence from its cost estimate of certain items (construction of an access road, water and sewer facilities, and gas, electric and telephone connections) and modified Issue 1 accordingly.[13] Tellum proposes to meet its construction and first year costs with existing capital of $2,398.51, deferred credit available of $11,032.16 [14] and revenues from operation of $40,000 (Tellum Application, Section III). The Commission also held that no showing had been made of the availabilty of the $40,000 revenues. Tellum represented in its application that if it did not gross the $40,000 revenues. the stockholders would finance the remaining costs by liquidating their assets (Tellum Application Exhibits 6 and 9).

28. Tellum's financial proposal was amended on June 2, 1971, after addition of the 1.65/1.514(a) issue and modification of the financial issue. The amendment provided for a loan guarantee in an amount up to $40,000 by L. M. Jack Beasley and it also revised Tellum's construction cost estimates. (Tellum application)

29. The November 1, 1969 balance sheet of Levoy Patrick Demaree and Reba Pearl Demaree indicates that the only liquid assets are cash of $1,750, and a note from Lymon F. Hart and his wife in the amount of $2.710.[15] The other assets consist of real estate, a 20% interest in Big Chief, an automobile, two boats, two trailers and household furnishings totalling $68,275. Demaree's liabilities are not listed according to short term and long terms, although it would appear that the only

[12a] This was subsequent to the Board's enlargement of the issues (FCC 71R–120).
[13] 28 FCC 2d 454, 456.
[14] Deferred credit on equipment from CCA Electronics of $16,271.52 less $748.48 down payment, less $4,490.88 first year payment to principal.
[15] The note itself does not appear in the record nor does evidence of its negotiability.

short term liabilities listed are accounts payable of $810. Other liabilities listed total $8,605 (Tellum Application, Ex. 7).

30. The November 1, 1969 balance sheet of Paul Samuel Demaree and Martha Louise Demaree shows cash, $2,450.68 and cash value of insurance, $500 as the only liquid assets. Other assets, including two automobiles, real estate, household goods, radio broadcast equipment and a church bond total $26,820. Liabilities listed were real estate, $11,000 and accounts payable, $485. (Tellum Application Ex. 7).

CONCLUSIONS

31. The principal issue to be resolved here is whether, under the evidence of record, Tellum violated Rules 1.514(a) and/or 1.65 by failing to report certain liabilities incurred by Levoy Patrick Demaree in his individual capacity. Since this is a disqualifying issue, if Tellum did violate those rules, a determination must then be made whether Tellum intended to deceive the Commission. *Harvit Broadcasting Corp.*, 23 RR 2d 328 (1971); *Lester H. Allen*, 17 FCC 2d 439 (1969).

32. Section 1.514(a) of the Rules obliges an applicant to include *all* information called for by the particular form on which the application is made. Question 4 of Section III of FCC Form 301 requires each person who has agreed to furnish funds to submit a balance sheet showing *all* liabilities. That Tellum violated Section 1.514(a) by Levoy Patrick Demaree's failure to disclose three liabilities on the joint balance sheet of himself and his wife dated November 1, 1969, and filed with Tellum's application, seems certain.

33. Demaree failed to disclose his personal liability on an agreement, dated November 5, 1968, between Mr. and Mrs. Cecil T. Harris, and Big Chief. The amount of the liability was $2,350 as of the date the Tellum application was filed. Demaree also failed to disclose his liability on the mortgage held by the First Pyramid Life Insurance Company. Demaree retained this liability despite the fact that the payments were being made by Mr. and Mrs. Lymon F. Hart. The balance due on the loan at the time Tellum filed its application was between $9,000 and $11,500. Finally, Demaree failed to disclose his personal liability on the agreement between Stamps Radio and Little Chief, dated June 30, 1969. The total obligation after the down payment of $7,500 and the $5,000 due on or before December 31, 1969 was $22,500.

34. Demaree incurred two personal liabilities after the Tellum application was accepted for filing which were not timely reported to the Commission. The first is a Little Chief note to the McIlroy Bank, dated March 24, 1970, in the amount of $11,616.48, which bears Demaree's personal endorsement. The second liability was Demaree's endorsement of a note, dated January 19, 1971, from Big Chief to the McIlroy Bank, in the amount of $4,375.44.

35. Section 1.65 of the Rules requires an applicant to notify the Commission of substantial and significant changes in information furnished in a pending application. In adopting Section 1.65, the Commission listed among the examples of matters to be reported, a change of circumstances "sufficiently altering the financial status of an applicant as to be pertinent to financial qualifications". *Reporting of Changed Cir-*

cumstances, 3 RR 2d 1622, 1625 (1964). Demaree's obligations on the McIlroy Bank notes dated March 24, 1970 and January 19, 1971, are clearly matters which should have been reported pursuant to Section 1.65. Tellum, in its application, relied, in part, on the personal assets of Demaree. Specifically, Tellum had existing capital of $2,398 in the bank. In addition, L. P. Demaree had cash of $1,750 and P. S. Demaree had $2,450 cash for a total of $6,598 cash. Since the Commission determined that there was no basis shown for anticipated revenues of $40,000, the balance required for construction and first year operation would have to come from the liquidation of the Demarees' assets.[16] Accordingly, Demaree's liability on the McIlroy Bank notes could have had a significant effect on Demaree's financial position and in turn would have affected Tellum's financial qualifications.

36. Having found that Tellum violated both Sections 1.514(a) and 1.65 of the Rules, the question to be confronted and resolved is whether Tellum intended to deceive the Commission. Demaree's explanation that he failed to disclose his obligation on the Harris agreement because he was unaware of his personal liability lacks persuasion. His assertion that he did not read the agreement before he signed it cannot serve to explain away his ignorance. Similarly, Demaree's contention that he was forgetful does not absolve him of his responsibility, as an applicant for a new broadcast facility, to review all financial transactions in which he was involved to determine his liabilities. Demaree's testimony that he did not inquire about his liability on the Harris agreement until after the deposition session on December 7, 1970 is also difficult to believe. Demaree was on notice as of October 9, 1970 that he would be questioned as to whether he had sufficient funds to meet his commitments to Tellum. Moreover, on October 16, 1970, he was on notice that Horne was asking for the production of documents concerning evidence of the accuracy of his listed assets and liabilities. Demaree was represented by counsel at the deposition session. It would seem reasonable to suggest that he must have been advised to check into his personal obligations before the deposition session. Demaree also claims that he did not actually learn of his liability on the Harris agreement until after the deposition session and after the petition to enlarge was filed on February 9, 1971. This is contradicted by his own statement, dated January 6, 1971,[17] wherein he acknowledged that he personally signed the Harris agreement. In spite of this acknowledgment, Demaree's personal liability on the Harris agreement was not reported to the Commission until June 2, 1971, four months after the issues were enlarged. The fact, be it so, that Demaree supplied the information to the opposing counsel did not relieve him of the responsibility of filing that information with the Commission. A compelling conclusion to be drawn is that Demaree intended to conceal this lia-

[16] The amended financial proposal which would have relieved the Demarees of their commitment to liquidate their assets, if necessary, was not filed until June 2, 1971, well after the applications were designated for hearing and issues enlarged. Accordingly, it is not relevant to consideration of the Section 1.65/1.514(a) issue.

[17] The statement as noted in Finding 36, *supra*, was attached to a pleading filed by Horne to enlarge issues. Since Demaree's counsel had agreed at the deposition proceeding to provide information as to Demaree's personal liability on any indebtedness, it should follow that such document was furnished to Horne pursuant to that commitment.

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bility from the Commission, since the statement was not supplied to the Commission until the June 1971 amendment.

37. Demaree's explanation for his failure to report his primary liability on the First Pyramid mortgage does not erase the fact that if the Harts stopped making payments, First Pyramid would have looked to him as the mortgagee. In that case he would either have to make the payments himself or hope that the sale of the house on foreclosure would at least cover his remaining liability. Moreover, his continued failure to reveal this liability until the June 2, 1971 amendment is some evidence of an intent to conceal a substantial liability which surely would have affected his financial showing.

38. Demaree's explanation for his failure to report his liability on the Stamps agreement until June 2, 1971, is unacceptable. This liability was incurred June 30, 1969, just four months prior to the date of Demaree's November 1, 1969 balance sheet. Certainly this transaction would have been relatively fresh in his mind when he was preparing that balance sheet. Demaree states that although he consulted with his local attorney in February or March 1971, concerning his liability on the Stamps agreement, that he believed he was not informed thereon until just prior to filing the June 2, 1971 amendment. That his attorney would wait three to four months to inform Demaree of his secondary liability on an agreement involving over $20,000, is equally unconvincing. Moreover, the explanation is unacceptable in the light of the fact that in December, 1970, Demaree was specially aware that his adversary was seeking to determine all obligations on which he was a signatory and that his counsel had agreed to furnish all notes and data regarding such obligations. Certainly the Stamps agreement had to be included. Demaree could hardly forget that he owed $20,000 on the agreement. Demaree's statement, that he thought the deposition, in which the Stamps agreement was mentioned, would be filed with the Commission, makes little sense in view of his testimony at the deposition proceeding that he was not personally liable on the Stamps agreement.

39. The failure to report the Little Chief note to McIlroy Bank in the amount of $11,616.48 dated March 24, 1970, is not excused by Demaree's explanation that he thought there was little likelihood of his being required to pay if Little Chief defaulted. Moreover, there is no evidence to support Demaree's belief that in the event of default Beasley and Thompson could or would pay the balance of the note, or that the order of priority would require the holder of the note to look to them before demanding payment from Demaree.

40. The Big Chief note, signed January 19, 1971, after the deposition session, was not reported until June 2, 1971. By this time Demaree surely was aware of the necessity of reporting additional liabilities to the Commission. Yet he waited until after the issues were enlarged to report his secondary liability on Big Chief's note to the McIlroy Bank. The only reasonable explanation for his failure to report it is an intent to conceal this liability from the Commission.

41. All of the above instances disclosing a failure to comply with the Commission Rules, when considered objectively, establish a clear pattern of conduct by the applicant to conceal from the Commission in-

formation required to be filed, which had a direct bearing on the financial qualifications of Demaree. Such a conclusion is fortified by the fact that Demaree is not a new applicant, but one who has held interests in broadcast enterprises for a substantial number of years. That the Commission expects all applicants, especially those having broadcast interests, to comply with its rules, goes without saying. The evidence of record is compelling and it is ultimately concluded that Tellum's repeated violations of Section 1.514(a) and 1.65 of the Rules are too numerous and substantial to be overlooked and were the result of an intent to conceal financial information from the Commission.

42. Tellum in a pleading (reply proposed findings) characterizes this proceeding as "this monstrous case". Perhaps this is little more than lawyers' hyperbole. Whatever attributes of that characterization may appear, they certainly cannot be placed on the doorstep of the Broadcast Bureau. The facts, abundant in the evidence, attest to the ineligibility of this applicant to be a licensee of a great public trust. Little more needs saying than to observe what the Supreme Court in *FCC* v. *WOKO, Inc.* (329 U.S. 223, 227 (1946)) said:

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.

Since the evidence discloses that much more than non-culpable inadvertent errors is involved here, this substantial non-compliance with the Commission's Rules warrants the conclusion that, in these premises, Tellum lacks the basic qualifications to be a Commission licensee.

Accordingly, for the aforesaid reasons and the public interest so requiring IT IS ORDERED that, unless an appeal to the Commission from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion under Section 1.276 of the Rules, the application of Tellum Broadcasting Company of Searcy, Inc. BE AND IS HEREBY DENIED; that being so, IT IS FURTHER ORDERED that the Joint Petition for Approval of Agreement under Section 1.525 of the Rules on which action was heretofore stayed, BE AND IS HEREBY DENIED and the agreement subsumed thereunder IS DISAPPROVED; and IT IS FURTHER ORDERED that the application of Horne Industries, Inc. shall otherwise remain in hearing status to be disposed of at a convenient hearing date by subsequent Order.

FEDERAL COMMUNICATIONS COMMISSION,
JAMES F. TIERNEY, *Administrative Law Judge.*

F.C.C. 73-565

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice of
APPARENT LIABILITY FOR FORFEITURE TO WEIGEL BROADCASTING CO., LICENSEE OF STATION WCIU-TV, CHICAGO, ILL.

MAY 23, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
WEIGEL BROADCASTING CO.,
Licensee of Station WCIU-TV,
Board of Trade Building,
141 West Jackson Boulevard,
Chicago, Ill. 60604

GENTLEMEN: This letter constitutes Notice of Apparent Liability for forfeiture, issued pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

From February 1, 1970, through September 24, 1972, WCIU-TV broadcast a program which the licensee states was entitled "National Chinchilla Ranching" or "Chinchilla Ranching." The same program, approximately 28-minutes and 30-seconds in length, was presented one time per week during this period and was sponsored by a firm doing business as National Chinchilla, Inc. Located in Shawnee Mission, Kansas, National Chinchilla, Inc., characterizes its business operation as a national "wholesale chinchilla distributor" which sells chinchillas exclusively through authorized dealers to individuals established in the chinchilla ranching business and to individuals who are interested in becoming full or part-time chinchilla ranchers. The company states that it also arranges bank financing for parties interested in purchasing chinchillas and assists them in establishing the proper environment in which marketable chinchillas can be bred and raised after purchase.

According to supplemental material submitted by you, the direct sources of the program's continuity were the advertising agencies, Jackson Waterbury & Company, St. Louis, Missouri, which provided you with the program from February 1 through December 9, 1970, and thereafter Sher & Jones, Inc., Kansas City, Missouri. For each weekly half-hour broadcast of the program, the station received from National Chinchilla, Inc., $350 less advertising agency commission of 15%. You state that the program was submitted by the Jackson Waterbury & Company agency to the National Association of Broadcasters Code Authority which, after several resubmissions, approved the program as meeting its standards for broadcast.

Pursuant to the Commission's request, you submitted facsimiles of two "sample" program logs which are intended to illustrate the log entries made for "National Chinchilla Ranching" at the time of each broadcast involved. These logs, dated May 28 and July 30, 1972, indicate that the questioned program was entered on the logs as a "commercial announcement." Although the beginning and ending times of the program are shown, the logs do not show the amount of time consumed by the commercial message. In your January 12, 1973, response to a Commission inquiry, you state that the commercial portion of the program consumed approximately 8-minutes and 20-seconds, and the failure of the logs to reveal this information resulted from an oversight by members of your traffic department. Section 73.670(a)(2)(ii) of the Commission's Rules requires that log entries be made "showing the total duration of commercial matter in each hourly time segment (beginning on the hour) or the duration of each commercial message (commercial continuity in sponsored programs, or commercial announcements) in each hour . . ." Since neither of the above types of entry was made on the logs you have submitted for review, it appears that you have violated Section 73.670(a)(2)(ii). Additionally, no entry appears on the logs identifying National Chinchilla, Inc., as the program sponsor as required by Section 73.670(a)(2)(i). In this regard, you state that the station's traffic employees were inclined to enter the sponsor's name only once on the log instead of duplicating its name under the sponsor column when the program had a single sponsor. Although the program was entered on the logs as "Chinchilla Ranching", no entry appears that would identify National Chinchilla, Inc., as the sponsoring entity. The referenced section of the Rule requires that such an entry be made, except where ". . . the title of a sponsored program includes the name of the sponsor, e.g., XYZ News . . ." It appears, therefore, that this failure to identify the sponsor of the questioned program constitutes violation of Section 73.670(a)(2)(i). The logs also disclose the absence of entries indicating the classification of the program as to type as required by Section 73.670(a)(1)(iii) and the source of each program as required by Section 73.670(a)(1)(iv).

Although, as noted above, you state that the commercial portion of the program should have been computed as eight minutes and 20 seconds in duration, the script of the program submitted by you indicates that in fact the content of the so-called noncommercial and the admittedly commercial portions of the program were so closely related and interwoven that in fact the entire program should have been considered as a commercial message. The script discloses that the purportedly noncommercial segment is devoted to a discussion of the South American origins of the chinchilla; general acceptance of the chinchilla's pelt as the source of "luxurious fur" known for its beauty, value as an economic commodity, and wearability in the form of outerwear; statements that the fur cannot be reproduced synthetically; and the expectation of monetary enrichment to chinchilla ranchers, both professional and amateur, created by the demand for the animal's pelt by manufacturers of chinchilla fur coats. There are, additionally,

numerous direct and indirect references to the fact that demand for chinchilla fur exceeds the available supply and that chinchilla ranchers are engaged in a lucrative enterprise. The major portion of this segment consists of a discussion between the program's narrator and Mr. Tony Busch, a fur grader associated with the Blend-Trast Grading System, who is characterized by the program's narrator as "a recognized authority on chinchilla breeding and ranching." The discussion deals with the animal and its physical attributes, the raising and breeding processes, including the proper environment in which the chinchilla should be raised and bred, the equipment needed to effectuate such processes, and the procedures chinchilla ranchers should follow to ensure salability of the chinchilla. This portion of the program consumes approximately 20 minutes.

There follows an eight-minute segment which you acknowledge is a commercial message promoting the services of the sponsor, National Chinchilla, Inc., and which is clearly identified as such. This segment features the announcer and Robert Bouckhout of National Chinchilla, Inc. Much of this presentation repeats what had been stated about chinchilla ranching during the purportedly non-commercial segment of the program while asserting that the sponsor employs only those methods that are considered optimal for raising and breeding chinchilla consistent with the information presented during the initial twenty-minute portion of the program. The particular focus of the admittedly commercial segment is upon the high quality of animals bred and raised by the sponsor; in particular, requests are made alternatively by the narrator and Bouckhout that members of the viewing audience interested in pursuing chinchilla ranching as a business make contact with the station to arrange a visit with the company's representative, who would explain the company's services and propose the possibility of financing an investment in such services offered by National Chinchilla, Inc.

Based on the above, it appears that this entire program, "National Chinchilla Ranching," constituted an advertisement for National Chinchilla, Inc., and that, contrary to your assertions in this regard, all 28-minutes and 30 seconds of the program must be considered as commercial. The program's format, the utilization of the company's product in the program's title, the employment of the same individual to narrate the initial 20-minute segment and to engage in the discussion during the final 8-minute segment, and the statements made throughout the program representing chinchilla ranching as monetarily lucrative, all appear to be intended to induce viewers to become customers of National Chinchilla, Inc. Besides promoting National Chinchilla, Inc., by name, the final 8-minute segment emphasizes that the company employs only those raising and breeding methods that had been described in the initial segment as most suitable for producing a readily marketable chinchilla fur of high quality. One additional fact should be noted as indicating that the program was designed and broadcast as a commercial message in its entirety: over the two and one-half year period during which "National Chinchilla Ranching" was presented by WCIU–TV, the station broadcast the identical pro-

gram without change. When all of the circumstances are considered, it appears that any informational or entertainment aspects the program may contain are wholly incidental to the commercial promotion of National Chinchilla, Inc., and that the non-commercial and commercial portions are so intertwined with the promotion of the company's services that the entire program must be considered a program-length commercial and should have been logged as such.[1]

The Commission has considered the circumstances of this case and has determined that pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, you have incurred an apparent liability for forfeiture in the amount of five thousand dollars ($5,000) for willfully or repeatedly failing to observe Sections 73.670(a)(2)(ii), 73.670(a)(2)(i), 73.670(a)(1)(iii), and 73.670(a)(1)(iv) of the Commission's Rules each week during the broadcast of the above-described program through September 24, 1972. This proceeding is confined to those violations which occurred within one year of the date of the issuance of this Notice of Apparent Liability.

You are hereby notified that you have the opportunity to file with the Commission, within thirty days of the receipt of this Notice, a statement in writing as to why you should not be held liable, or, if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations set out above, any justification for the violations involved, and any other information that you may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of such reply, the Commission will determine whether the facts set forth are sufficient to relieve you of liability, or to justify either reduction or remission of the amount of liability. If it is unable to find that you should be relieved of liability, the Commission will issue an Order of Forfeiture, and the forfeiture will be payable to the Treasurer of the United States.

If you do not file, within thirty days of receipt of this Notice, either a statement of non-liability or a statement setting forth facts and reasons why the forfeiture should be of a lesser amount, the Commission will enter an Order of Forfeiture in the amount of five thousand dollars ($5,000).

If you do not wish to file a statement that denies liability and, in addition, you do not wish to await the issuance of an Order, you may within thirty days of the receipt of this letter, make payment of the forfeiture by mailing to the Commission a check or similar instrument in the amount of five thousand dollars ($5,000) drawn payable to the Treasurer of the United States.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] The Commission's rulings in the program-length commercial area include the following: *Topper Corporation*, 21 FCC 2d 148 (1969); *American Broadcasting Companies, Inc.*, 23 FCC 2d 132 (1970); *Columbus Broadcasting Company, Inc.*, 25 FCC 2d 56 (1970); *Multimedia, Inc.*, 25 FCC 2d 59 (1970); *KCOP–TV, Inc.*, 24 FCC 2d 149 (1970); *Dena Pictures, Inc.*, 31 FCC 2d 206 (1971); *National Broadcasting Company*, 29 FCC 2d 67 (1971); *WUAB, Inc.*, 37 FCC 2d 748 (1972) and *WFIL, Inc.*, 38 FCC 2d 411 (1972).

F.C.C. 73–566

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice of
APPARENT LIABILITY FOR FORFEITURE TO WEIGEL BROADCASTING CO., LICENSEE OF STATION WCIU–TV, CHICAGO, ILL.

MAY 23, 1973.

WEIGEL BROADCASTING CO.,
Licensee of Station WCIU–TV,
Board of Trade Building,
141 West Jackson Boulevard,
Chicago, Ill. 60604

GENTLEMEN: The Commission has on this date issued to you a Notice of Apparent Liability for forfeiture for violation of the Commission's logging Rules in connection with the broadcast of a program on Station WCIU–TV sponsored by National Chinchilla, Inc.

That Notice sets forth fully the violations upon which it is based, which will not be repeated in this letter. However, for the reasons set forth in the Notice, you appear to have engaged for more than two and one-half years in the practice of broadcasting each week an identical 28½ minute program-length commercial, which is a matter of great concern to the Commission, entirely aside from violations of the logging Rules which resulted from the broadcasts.

As we stated in our Public Notice titled "Program-Length Commercials" (FCC 73–215), sent to all broadcast licensees on February 22, 1973:

> Program-length commercials raise three basic problems. Of primary concern is that such programs may exhibit a pattern of subordinating programming in the public interest to programming in the interest of salability. In addition, a program-length commercial is almost always inconsistent with the licensee's representations to the Commission as to the maximum amount of commercial matter that will be broadcast in a given clock hour. Finally, there are usually logging violations involved . . .

We stated further:

> In the past, the broadcast of such programs has resulted in issuance of letters of admonition and/or relatively small forfeitures based on the logging violation aspect of the cases. However, the Commission continues to receive evidence that some stations still are broadcasting programs which, because of the interweaving of "entertainment" or "informational" content with promotion of the advertisers' products, are program-length commercials.
>
> This constitutes a reminder that the Commission considers the broadcast of such programs to involve a serious dereliction of duty on the part of the licensee, and a notice to all licensees that the Commission intends in the future to consider imposition of sanctions which it believes will be more effective in bringing about a discontinuance of the practice.

Although the broadcasts of the program-length chinchilla commercials on WCIU–TV ceased before the above Notice was issued, you had been put on notice by many Commission rulings of our policies with respect to this subject.[1] Nevertheless, it appears that by broadcasting the identical half-hour presentation from February 1, 1970 through September 24, 1972, you exhibited a pattern of subordinating programming in the public interest to programming in the interest of salability, and that by broadcasting at least 28½ minutes of commercial advertising in a single hour each week, you disregarded the representation made in your last renewal application that you would normally present no more than 16 minutes of advertising per hour.

You are requested within twenty days of the date of this letter to furnish the Commission with a statement of your future policies regarding broadcast of program-length commercials. Your response and your operation of the station in the ensuing months will be considered, along with all other pertinent information, when the next application for renewal of license of WCIU–TV is received.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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[1] Commission rulings in this area which were issued long before you discontinued broadcast of the chinchilla program in late September 1972 include the following: *Columbus Broadcasting Company, Inc.*, 25 FCC 2d 56 (1970); *Multimedia, Inc.*, 25 FCC 2d 59 (1970); *KCOP–TV, Inc.*, 24 FCC 2d 149 (1970); *Dena Pictures, Inc.*, 31 FCC 2d 206 (1971); and *National Broadcasting Company*, 29 FCC 2d 67 (1971).

F.C.C. 73R-228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT-327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT-4465

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1973; Released June 19, 1973)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for consolidated hearing by Commission Order, 37 FCC 2d 266, released September 1, 1972. By Memorandum Opinion and Order, 39 FCC 2d 1077, 26 RR 2d 1456, released March 9, 1973, the Review Board added several issues against Las Vegas Valley Broadcasting Co. (Valley), including one "to determine the terms and conditions of the proposed bank loan from Nevada State Bank relied upon by Valley, whether Valley can meet those terms and conditions, and whether, in light thereof, the proposed loan will in fact be available to it." The issues were added pursuant to a motion to enlarge issues, filed October 6, 1972, by Western Communications, Inc. (Western). In the same Memorandum Opinion and Order, the Board denied Western's requests for numerous other issues, including an issue inquiring into the alleged withdrawal and misrepresentation of the aforementioned bank loan [1] and an issue inquiring into the adequacy of Valley's studio and office facilities.[2] Now before the Review Board is a motion filed by Western on March 19, 1973, and entitled "Motion to Add Bank Loan Availability, Misrepresentation and Studio Issues With Respect to the Application of [Valley] in Light of Newly Discovered Facts". The

[1] The requested issue read as follows:
To determine whether a loan commitment from the Nevada State Bank has been withdrawn and, if so, whether Las Vegas Valley Broadcasting Co., (a) is financially qualified, (b) has misrepresented facts to the Commission concerning the existence of the loan commitment, and (c) failed to comply with Section 1.65 of the Commission's Rules by not reporting the withdrawal of the loan commitment.

[2] The requested issue was:
To determine whether Las Vegas Valley Broadcasting Co., has proposed adequate studio and office facilities, and if not, whether it can effectuate its proposal.

motion requests the addition of issues similar to those which were denied in our earlier Memorandum Opinion and Order, *supra*. Oppositions to the motion were filed by the Broadcast Bureau and Valley on April 2 and 3, 1973, respectively. Western filed a reply on April 12, 1973. The motion will be denied.

2. Although the motion is not an unauthorized petition for reconsideration, as Valley argues,[3] and although good cause has been shown for the tardiness of the pleading,[4] the motion is entirely without merit. First there is no showing by Western that the bank loan was withdrawn or that Valley ever misled the Commission concerning the availability of the loan. It is conceded by all the parties that some terms of the loan have been modified by the bank; however, the bank, in a letter from its general counsel, states that "at no time has the bank withdrawn its letter of August 23, 1971, to Valley and that the Bank remains willing to make the loan pursuant to the terms stated in said letter." Furthermore, the changes were reported in timely fashion by Valley in full compliance with the Commission's Rules.[5] The terms and conditions of the bank loan can, of course, be examined under the existing issue. See paragraph 1, *supra*. Second, Western has not shown that there has been any change in Valley's studio proposal sufficient to warrant the addition of a studio adequacy issue. The two letters relied upon by movant to support its renewed request[6] do not in any way change Valley's studio proposal or indicate that Valley will not be able to operate a television station utilizing its proposal. In our view, Valley "has presented a studio proposal which is reasonably capable of effectuation." *California Stereo, Inc.*, 39 FCC 2d 401, 403, 26 RR 2d 887, 891 (1973).[7] Therefore, for the foregoing reasons and also for the reasons stated in our March 9, 1973, Memorandum Opinion and Order, *supra*, Western's motion will be denied.

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[3] *Cf. Hartford County Broadcasting Corp.*, 10 FCC 2d 695, 11 RR 2d 726 (1967); *Victor Management Co., Inc.*, 1 FCC 2d 1197, 6 RR 2d 40 (1965).

[4] It appears that the facts upon which the motion is based were unknown to Western until February 28, 1973, when Valley filed an unauthorized response to Western's reply in connection with Western's October 6, 1972, motion. The response was dismissed by us in our Memorandum Opinion and Order, *supra*. Under the circumstances, we believe good cause has been shown for the late filing. See *United Television Co., Inc. (WFAN–TV)*, 33 FCC 2d 424, 23 RR 2d 644 (1972).

[5] Pertinent amendments to Valley's application were accepted by the Administrative Law Judge, by Orders released April 5 and 24, 1973.

[6] One letter is from George C. Brookman, a Valley stock subscriber, to James E. Rogers, Valley's President. Brookman, a general contractor in Las Vegas, proposes to alter his building for Valley's use as a television facility. The letter specifies how this will be done. The other letter is from a loan officer of a Las Vegas bank and states that the bank is entertaining a loan request from Brookman in the amount of $75,000 for the purpose of remodeling his building to accommodate a broadcasting studio.

[7] Compare *Cowles Florida Broadcasting, Inc.*, 36 FR 4901 (1971), where the Commission "lack[ed] any indication as to whether [the proposed lessor of studio facilities] is financially qualified to meet [its] commitment." 36 FR at 4904.

3. ACCORDINGLY, IT IS ORDERED, That the motion to add bank loan availability, misrepresentation and studio issues with respect to the application of Las Vegas Valley Broadcasting Co., in light of newly discovered facts, filed March 19, 1973, by Western Communications, Inc. (KORK–TV) is denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-629

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN UNION TELEGRAPH CO. For Authority To Construct Four Earth Stations To Provide Domestic Communications Satellite Services	File Nos. 2-DSE-P-71; 3-DSE-P-71; 4-DSE-P-71; 5-DSE-P-71

ORDER AND AUTHORIZATION

(Adopted June 13, 1973; Released June 14, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULTS; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it the above-captioned applications of Western Union Telegraph Company (Western Union) for authority to construct earth stations near Los Angeles, California; Dallas, Texas; Chicago, Illinois; and Atlanta, Georgia. The applications were originally filed on July 30, 1970 as part of Western Union's domestic satellite system proposal submitted pursuant to the first *Report and Order* in Docket No. 16495 (22 FCC 2d 86), and were most recently amended on March 27 and April 9, 1973. There are no pending petitions to deny the applications and no unresolved frequency conflicts.

2. Western Union proposes to use these earth stations in conjunction with the satellites and New York earth station previously authorized to it by our *Order and Authorization* issued on January 18, 1973 (38 FCC 2d 1197) and the *Order and Authorization* issued on May 11, 1973 (FCC 73-501) to provide domestic communications satellite services. Each of the four earth stations will have a 50-foot diameter antenna. The Chicago, Dallas and Atlanta stations will each be equipped initially for transmission of one channel (message traffic) in the 5925-6425 MHz band and reception of four channels (message) in the 3700-4000 MHz band. The Los Angeles earth station will be equipped initially for transmission of three channels (two message and one video) at 6 GHz and reception of five channels (four message and one voice) at 4 GHz. The estimated cost of the four earth stations is $11,052,135.

3. In the orders and authorizations granting Western Union's satellites (38 FCC 2d 1197) and New York earth station (FCC 73-501), we found that Western Union is legally, technically, financially and otherwise qualified to undertake the construction and operation of its proposed domestic satellite system, that the facilities would not have an adverse impact on Western Union's existing services, and that its proposal is consistent with the policies adopted in Docket No. 16495.

Upon consideration of the radiation hazard and other environmental factors set forth in the instant applications, we are satisfied that construction of these earth stations will comply with the policies set forth in the Commission's Memorandum Opinion and Order of December 22, 1972 in Docket No. 16495 (38 FCC 2d 665, 703–704).

4. We find that Western Union is legally, technically, financially and otherwise qualified to construct the earth stations proposed here and that a grant of the instant applications would serve the public interest, convenience and necessity.[1]

5. Accordingly, IT IS HEREBY ORDERED That the above-captioned applications ARE GRANTED and Western Union IS AUTHORIZED to construct the earth stations in conformity with the specifications and parameters set forth in the construction permits.

6. IT IS FURTHER ORDERED that construction of the earth stations shall be completed in accordance with the technical specifications listed in the construction permits, no later than 18 months after the date of issuance of this authorization and that failure to complete construction within such time period shall result in automatic forfeiture of this authorization unless such construction period is extended by the Commission for good cause shown.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] While the applications make a general request for certification as necessary pursuant to Section 214 of the Communications Act, we think that Section 214 authorization should be sought by way of a separate application.

F.C.C. 73-581

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Request by
WOODLANDS TELECOMMUNICATIONS CORP.
For a Toll Connection With the Local Exchange Service it Proposes To Provide to the Woodlands, Tex. Community

MAY 31, 1973.

EDGAR MAYFIELD, ESQ.,
General Solicitor,
Southwestern Bell Telephone Co.,
1010 Pine Street,
St. Louis, Mo. 63101

DEAR MR. MAYFIELD: By letter of March 29, 1973, the Chief, Common Carrier Bureau requested that Southwestern Bell Telephone Company (SWBell) and Woodlands Telecommunications Corporation (WTC) submit written statements of position in the matter of WTC's request for a toll connection with the local exchange telephone service WTC proposes to provide to the Woodlands Community in Texas. Such submissions were to include both statements of fact and memoranda of law on specified questions. WTC has replied as requested. Your reply of April 12, 1973 was not fully responsive. You did not submit your position on the substantive issues involved but only stated your objections to the resolution of this matter without an evidentiary hearing. You set forth ten matters which you claim raise relevant factual issues to be resolved in an evidentiary hearing, stating that any attempt to dispose of the matter upon written submissions would be prejudicial.

Having reviewed the issues raised by the parties and mindful of the need for expeditious resolution of this controversy, we endorse the action taken by the Bureau. It is well established that unless a substantial issue of material fact is in controversy, no evidentiary hearing need be held. See *Lakewood Broadcasting Service, Inc.*, v. *FCC*, No. 72-1758, (D.C. Cir., May 4, 1973); see also Davis, *Administrative Law Treatise*, 1970 Supplement §§ 7.01-7.06, pp. 301-330 and cases cited therein. It is in the best interest of all concerned that time-consuming oral proceedings be utilized only to the extent necessary. If substantial issues of material fact remain after the parties have submitted their pleadings, evidentiary hearings will be held to resolve such issues.

The record for decision in this matter will be the correspondence heretofore received by the Commission and noted in the Bureau's letter, statements of position and replies submitted in response to that letter as well as matters received in any oral proceeding which may be held.

Having clarified the nature and purpose of the Bureau's request for information we offer you an additional "opportunity" to be heard in accordance with Section 201(a) of the Communications Act. You have two weeks from the date of this letter to submit your statement of position as requested by the Bureau's letter of March 29, 1973. As WTC has already submitted its statement of position, your reply to WTC's statement should be filed at the same time as your statement.

Commissioner Reid concurring in result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*